(18,920.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 274.

THE CITY OF SEATTLE, APPELLANT,

vs.

JOHN W. THOMPSON.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 1, 1903.

Supreme Court of the United States, October Term, 1903.

THE CITY OF SEATTLE, Appellant,
vs.
JOHN W. THOMPSON. } No. 274.

Extracts from the Transcript of Record.

* * * * * * *

(Record, p. 240.)

In the Circuit Court of the United States for the District of Washington, Northern Division. In Equity.

JOHN W. THOMPSON, Complainant,
vs.
THE CITY OF SEATTLE, Respondent. } No. 866.

Decree.

This cause coming on for final hearing at this term upon the bill of complaint, the answer of respondent thereto, and replication of complainant, and upon all the records herein, and testimony having been duly introduced on behalf of each of the parties, and after hearing argument by counsel on behalf of each of said parties; and it appearing that so far as concerns the property of complainant in the bill of complaint and hereinafter described all the assessment and reassessment proceedings referred to in the pleadings are null and void and of no effect as against the complainant or against his said lands; and it appearing to the court that the assessment levied against said lands of complainant by virtue of said assessment and reassessment proceedings, and by virtue of ordinances No. 3199 and 3267 of the respondent The City of Seattle, were and are null, void and of no effect whatever as against the complainant or against his said lands:

Now, therefore, on motion of Bausman and Kelleher, solicitors for complainant, it is—

Ordered, adjudged and decreed that all the assessment and reassessment proceedings referred to in the bill of complaint herein are null, void and of no effect whatever as against said complainant or against his said lands; that the assessment levied against said lands of complainant by virtue of ordinance No. 3267 of respondent, The City of Seattle, is null, void and of no effect whatever as against complainant or his said lands, and that the attempted levy of the assessment by virtue of said ordinance No. 3267 is null, void and of no effect as against complainant or his said lands, which are described more particularly as lots twelve (12) to twenty-four (24) inclusive, in block twenty-eight (28); lots nine (9) to sixteen (16)

inclusive, in block twenty-nine (29); lots fifteen (15) to twenty-eight (28), inclusive, in block thirty (30); lots fifteen (15) to twenty-eight (28) inclusive, in block thirty-one (31); lots twelve (12) to twenty-two (22) inclusive, in block thirty-two (32); lots one (1) to eleven (11) inclusive, in block thirty-three (33); lots one (1) to fourteen (14) inclusive, in block thirty-four (34); lots one (1) to fourteen (14) inclusive, in block thirty-five (35); and lots one (1), two (2), three (3), four (4) and nine (9) in block thirty-six (36) according to that certain plat called the Hill Tract addition, filed by Ben. E. Snipes and wife in the auditor's office of King county, State of Washington.

It is further ordered, adjudged and decreed that said respondent, The City of Seattle, has no claim of any kind against said lands, or any thereof, belonging to complainant on account of or by virtue of said assessment or said reassessment proceedings, or by virtue of any proceedings based on said assessment or said reassessment, or founded upon said levy of said assessment or upon said reassessment.

And it is further ordered, adjudged and decreed that said The City of Seattle, its officers, tax collectors, agents and attorneys, be and they are hereby forever enjoined and restrained from attempting to enforce the said assessment or reassessment levied against the said property of complainant and from attempting to levy or collect said assessment or reassessment levied against said lands of complainant hereinbefore described as lots in said Hill Tract addition and from selling said lands, or any part thereof; and said The City of Seattle, its officers, tax collectors, agents and attorneys are hereby forever enjoined and restrained from asserting any claim whatsoever in or to said lands or any part thereof, and that said respondent, The City of Seattle, has not any estate, right, title or interest in or to said lands of said complainant by virtue of said assessment or reassessment proceedings.

It is further ordered, adjudged and decreed that complainant has a clear title to the said lands so described as said lots, free and clear from all claim of any kind of said The City of Seattle founded or based upon said attempted assessment or reassessment against said lands.

It is further ordered, adjudged and decreed that said complainant have and recover from said respondent, The City of Seattle, his costs herein, taxed at one hundred three and 25-100 dollars ($103.25), and that execution issue therefor.

Dated June 22, 1901.

C. H. HANFORD, *Judge.*

To the foregoing decree and to each and every part thereof, respondent excepts and its exception is hereby allowed.

C. H. HANFORD, *Judge.*

Endorsed: Decree, Filed in the United States circuit court, district of Washington. June 22, 1901. A. Reeves Ayres, clerk. R. M. Hopkins, deputy.

(Record, p. 244.)

In the Circuit Court of the United States for the District of Washington, Northern Division.

JOHN W. THOMPSON, Complainant and Appellee,
vs.
THE CITY OF SEATTLE, a Municipal Corporation, Respondent and Appellant. } No. 866.

Petition for Appeal and Order Allowing Same.

The above-named respondent and appellant, The City of Seattle, conceiving itself aggrieved by the decree of said court entered on the 22d day of June, 1901, in the above entitled cause, it hereby appeals from said decree to the Supreme Court of the United States, and prays that this, its appeal, may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, properly authenticated, may be sent to the Supreme Court of the United States.

PRATT & RIDDLE,
Solicitors for The City of Seattle,
Respondent and Appellant.

And now, to-wit, this 19th day of January, 1903, it is ordered that said appeal be allowed as prayed for. An appeal bond is herein fixed at the sum of $500 *dollars.*

Dated this 19th day of January, 1903.

C. H. HANFORD, *Judge.*

Indorsed: Petition for appeal and order allowing same. Filed in the U. S. circuit court, district of Washington, Jan. 19, 1903. A. Reeves Ayres, clerk, H. M. Walthew, deputy.

(Record, p. 246.)

In the Circuit Court of the United States for the District of Washington, Northern Division.

JOHN W. THOMPSON, Complainant and Appellee,
vs.
THE CITY OF SEATTLE, a Municipal Corporation, Respondent and Appellant. } No. 866.

Assignment of Errors.

On the 19th day of January, 1903, the above-named respondent and appellant, by its solicitors, Pratt & Riddle, for its assignment of errors herein says that in the record and proceedings in the above-entitled cause upon the hearing and determination thereof in the above-entitled court, and in the judgment and decree rendered therein by said court, in said cause, under date and on the 22d day of June, 1901, there is manifest error in this, to-wit:

1. That said court erred in overruling respondent's and appellant's demurrer to complainant's and appellee's bill of complaint on

the ground that the same does not state a cause of action against respondent and appellant.

2. That said court erred in denying respondent's and appellant's motion to dismiss, made at the close of complainant's and appellee's testimony, on the grounds stated in the record, viz: That complainant, appellee, here, has not established any right of action or cause against respondent, appellant here, or shown any reason for any relief; that complainant and appellee has not shown that there was not a dedication of Weller street in the city of Seattle, as improved and as described in the bill of complaint, and has not shown that the lien of the assessment under the reassessment proceedings, as described in the complaint, was not a valid and legal assessment; and, further, that the complainant and appellee has not offered to do equity in the premises.

3. That said court erred in rendering a decree granting complainant and appellee the relief prayed for in said bill of complaint.

Wherefore the above-named respondent and appellant, The City of Seattle, prays that this its assignment of errors, be entered upon the record of this cause; and it further prays that upon the hearing of this appeal the said decree be in all things reversed, and that complainant's and appellee's said bill of complaint and its said cause be dismissed.

Dated this 19th day of January, 1903.

THE CITY OF SEATTLE,
Respondent and Appellant,
By PRATT & RIDDLE, *Its Solicitors.*

Indorsed: Assignment of errors. Filed in the U. S. circuit court, dist. of Washington, Jan. 19, 1903. A. Reeves Ayres, clerk. H. M. Walthew, deputy.

(Record, p. 249.)

In the Circuit Court of the United States for the District of Washington, Northern Division. In Equity.

JOHN W. THOMPSON, Complainant and Appellee,
vs.
THE CITY OF SEATTLE, a Municipal Corporation, Respondent and Appellant. } No. 866.

Bond on Appeal.

Know all men by these presents, that we, The City of Seattle, by Thomas J. Humes, its mayor, as principal, and R. H. Thomson, as surety, for the above-named respondent and appellant, are jointly and severally held and firmly bound unto John W. Thompson, the above-named complainant and appellee, in the penal sum of five hundred dollars, to him to be paid, for the payment of which jointly and severally, we bind ourselves, our successors and assigns, our heirs, executors and administrators, firmly by these presents.

Witness our hand and the corporate seal of the said City of Seattle, this 16 day of January, 1903.

The condition of the above obligation is such, that, whereas the above-named City of Seattle has prosecuted an appeal to the Supreme Court of the United States in the above entitled cause:

Now, therefore, if the said City of Seattle, respondent and appellant, shall prosecute its said appeal to effect and answer all costs, then this obligation shall be void, otherwise to remain in full force and effect.

THE CITY OF SEATTLE,
[CORPORATE SEAL.] By T. J. HUMES, *Its Mayor.*
R. H. THOMSON.

Attest: JNO. RIPLINGER,
City Comptroller.

DISTRICT OF WASHINGTON, } ss.
State of Washington, County of King, }

Personally appeared before me, the undersigned, a notary public in and for the State of Washington, R. H. Thomson, to me known to be the surety named in the foregoing bond, who, being first duly sworn, on oath says that he is a resident and freeholder within the district, and is worth the sum of $500 *dollars* over and above all debts and liabilities and exclusive of property exempt from execution.

Witness my hand and official seal this 16 day of January, 1903.

[NOTARIAL SEAL.] ROB'T F. BOOTH,
Notary Public in and for the State of Washington, Residing at Seattle.

The foregoing bond is approved by me this 19th day of January, 1903.

C. H. HANFORD, *Judge.*

Indorsed: Bond on appeal. Filed in the U. S. circuit court dist. of Washington, Jan. 19, 1903. A. Reeves Ayres, clerk. H. M. Walthew, deputy.

* * * * * * *

(Record, p. 319.)

In the Circuit Court of the United States for the District of Washington, Northern Division. In Equity.

JOHN W. THOMPSON, Complainant and Appellee,
vs.
THE CITY OF SEATTLE, a Municipal Corporation, Respondent and Appellant. } No. 866.

Citation on Appeal.

The United States of America to John W. Thompson, complainant and appellee, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Wash-

ington, D. C. within sixty days from the date hereof, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of Washington, northern division, wherein John W. Thompson, is appellee, and The City of Seattle is appellant, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected, and speedy justice should not be done to the party on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 19th day of January, 1903.

[SEAL.] C. H. HANFORD, *Judge.*

Return on Service of Writ.

UNITED STATES OF AMERICA, }
District of Washington, } ss:

I hereby certify and return that I served the annexed citation on appeal on Bausman & Kelleher, attorneys of the therein-named John W. Thompson, by handing to and leaving a true and correct copy thereof with Daniel Kelleher, one of the firm of said attorneys, Bausman & Kelleher, personally at his office in Seattle in said district on the nineteenth day of January, A. D. 1903.

C. B. HOPKINS,
U. S. Marshal,
By H. W. TYLER, *Deputy.*

Marshal Fees.

Service	$2.00
Mileage	.12
Total	$2.12

Endorsed: No. 866. In the circuit court of the United States for the district of Washington. John W. Thompson vs. City of Seattle. Citation on appeal. Filed in the U. S. circuit court dist. of Washington, Jan. 19, 1903. A. Reeves Ayres, clerk, by H. M. Walthew, deputy.

* * * * * * *

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903

THE CITY OF SEATTLE, APPELLANT,
vs.
JOHN W. THOMPSON, RESPONDENT.

No. 274.

BRIEF ON MOTION TO DISMISS

The motion to dismiss is based upon the alleged want of jurisdiction of this Court to hear the appeal, and is based upon the record and upon the affidavit of the administrator of John W. Thompson, deceased, filed in this cause. The motion is made by Daniel Kelleher, as administrator of Thompson, deceased. Kelleher seeks to limit his appearance solely for the purpose of the motion. It appears from the statement in the brief of Kelleher that Thompson died on the 11th day of July, 1901; that he, Kelleher, was appointed administrator on the 6th day of August of the same year, and that he has ever since been administrator of the estate in the State of Washington.

The brief of Kelleher presents the anomoly of a person not a party to a proceeding seeking to have the proceeding dismissed.

The motion to dismiss does not point out the particular facts in which the want of jurisdiction appears, but simply contents himself with asking the Court to dismiss the case for want of jurisdiction; such is not a sufficient specification of the ground upon which a motion may be based. It is necessary that a motion should specify particularly the grounds relied upon.

We are unable to find anything in the rules of this Court, or in the law applicable thereto, entitling one to make a special appearance. Mr. Kelleher has either appeared in this Court or he has not. If he has appeared, it is by reason of being a representative of the deceased, and his appearance dispenses with the necessity of taking the steps required by rule 15 of this Court. He becomes a party by his own voluntary act, and he cannot voluntarily submit himself to the jurisdiction of this Court and ask the Court to dismiss the appeal, because he has not properly been brought into the Court. If he desired to move to dismiss the appeal, he should have waited until he had been properly made a party and then would have been the proper time to make such motion. Under subdivision 2 of Rule 15, the action will not abate until the 10th day of the second term next succeeding the suggestion of the death.

The citation on appeal in this case was served upon Daniel Kelleher, who, it appears, had been one of the attorneys for the complainant, since deceased, in this cause. (Printed Transcript, pp. 5-6.) At the time of such service Daniel Kelleher was the administrator of said deceased. So it appears that the service of the citation was made upon one of the proper representatives of the de-

ceased, although no formal order of substitution had been made. The fact that the citation was addressed to the deceased is an irregularity which is not fatal to the appeal.

Bigler vs. Waller, 12 Wall. 142.

An appeal in an equitable cause is different from a writ of error. The latter is considered in the light of a new suit; the former is a continuation of the old case. Under the rule of this Court, substitution of the representatives of the deceased and the revival of the cause is made as a matter of course upon proper suggestion by the appellant. Simultaneously with the filing of this brief, appellant files its suggestion of the death of Thompson, the appointment of Kelleher as administrator for the State of Washington, and the trusteeship of the American Security & Trust Company, and moves this Court that the cause may be revived and these representatives substituted, in case they do not voluntarily become parties. For the convenience of the Court, we print herein copy of said suggestion and motion:

Comes now the appellant, The City of Seattle, and respectfully represents to this Court as follows:

I.

That the decree rendered in the United States Circuit Court, for the District of Washington, Northern Division, in the above entitled Court, was duly signed and filed in said Circuit Court on the 22nd day of June, 1901.

II.

That the defendant and appellee in this cause, John W. Thompson, died on the 11th day of July, 1901, leaving a will, by which the American Security & Trust Company

of the District of Columbia, was created and ever since has been the duly qualified and public trustee of his estate.

III.

That on or about the 6th day of August, 1901, Daniel Kelleher, a citizen of the State of Washington, and residing in King County in said State, was duly appointed administrator of the estate of the said John W. Thompson, deceased, by the Superior Court of the State of Washington, King County, and thereupon duly qualified as such administrator, and ever since has been and now is the duly appointed, qualified and acting administrator of the estate of John W. Thompson, deceased, in the State of Washington.

NOW, THEREFORE, in consideration of the premises, the above named appellant, the City of Seattle, respectfully moves this Honorable Court that an order be entered herein, that unless the said representatives of the said John W. Thompson, deceased, voluntarily become parties to this appeal within the first ten days of the next ensuing term of this Court, a copy of such order be printed in some newspaper of general circulation in the State of Washington, from which the above entitled cause is brought, for three successive weeks, and at least six days before the next ensuing term of this Court.

WALTER FULTON,
Attorney for Appellant.

MITCHELL GILLIAM,
Corporation Counsel for the City of Seattle.
Of Counsel.

The foregoing motion is duly verified by the Mayor of the City of Seattle.

The voluntary appearance of Kelleher as adminis-

trator upon his own suggestion of the death of the appellee has probably rendered this motion unnecessary, but we have made it in order to do whatever was in our power to maintain this appeal. It is a matter of considerable consequence, and proceedings in this case have been somewhat hampered by the death of the attorney who originally instituted this proceeding, and we believe for the reasons above stated, that the appeal should not be dismissed upon this motion.

WALTER FULTON.
Attorney for Appellant.

MITCHELL GILLIAM.
Of Counsel.

IN THE

Supreme Court of the United States

(18920)

THE CITY OF SEATTLE, *Appellant*, vs. DANIEL KELLEHER, Administrator of John W. Thompson, deceased, *Respondent*.		No. 274

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

W. C. Hill and Alice S. Hill, his wife, were, on the 30th day of August, 1890, and for a long time prior thereto, the owners of a tract of land, consisting of about one hundred acres, situated within the corporate limits of the City of Seattle, lying between the Maynard Donation Claim on the west, and the Jackson Street Addition on the east. The Maynard Donation Claim and the Jackson

Street Addition were platted additions to the City of Seattle, and among the streets in those two additions was a street running east and west called Weller street. The distance across the tract of land owned by Hill from Weller street in the Maynard Donation Claim, to Weller street in the Jackson Street Addition, was about 2500 feet.

In May, 1889, W. C. Hill submitted to the City Council a plat of said one hundred acre tract, showing a continuation of Weller street across said tract of land from the easterly boundary of Maynard's Donation Claim to the westerly boundary of Jackson Street Addition. This plat showed the tract divided into lots and blocks, streets and alleys; among the streets appearing thereon were Washington and King streets, running parallel with Weller street, and being extensions of streets of those names already existing upon the Maynard Donation Claim. This plat was executed with all the formalities required by the laws of the State of Washington, and submitted to the City Council for its approval. (Record, pp. 9, 10, 147; Exhibit 1, not printed.)

After the approval of this plat, Hill omitted to have it filed for record in the County Auditor's office, but took it to Washington, D. C., and had a large number of lithographic cuts made of it, which were sent to Seattle and kept in an office maintained by him there, and a number of them distributed among the real estate agents of the City of Seattle. (Testimony of W. L. Meredith, pp. 98 to 109.)

In August, 1889, Hill, with other property owners on Weller street, signed a petition to the Council of the City of Seattle, asking that Weller street be extended and graded from Elliott Bay to the west line of Jackson Street Addition, which would include the entire length of Weller street across the hundred acre tract above mentioned.

(Record, pp. 16, 47 and 148.) This petition was favorably acted upon by the City Council. Pursuant thereto the City Council on the 10th day of February, 1890, duly passed Ordinance No. 1285, providing for the grading and sidewalking of Weller street, from Fifth street to Jackson Street Addition. (Record, pp. 2, 53 and 142.) Thereupon the contract was let for the work and the work was completed some time prior to the 12th day of March, 1891. (Record, p. 7.)

Mr. Hill also petitioned the City Council to improve King street and Washington street upon this tract of land, and according to the plat he had executed. (Record, 100, 153, 154.)

Assessment was made upon the property benefited to pay for said improvement of Weller street, in accordance with the then existing charter of the City of Seattle, which provided that the cost of local improvements should be assessed upon abutting property according to valuation. (Record, p. 4.) This assessment was attacked in the courts and adjudged to be void. (Record, p. 8.)

Hill died on the 30th of August, 1890.

The rights of the respondents' intestate accrued from a mortgage executed by one Ben E. Snipes to John W. Thompson, dated the 30th day of January, 1892. Thompson began foreclosure proceedings on the 21st day of December, 1893, which ripened into a legal title on the 5th day of October, 1895. (Record, pp. 8, 51.)

The Legislature of the State of Washington, on the 9th day of March, 1893, passed an act authorizing the collection of assessments for local improvement by a new assessment, or re-assessment for the costs of making the same. (A copy of so much of said act as affects the questions involved in this cause may be found in the appendix.)

In the meantime, the City of Seattle had adopted what is known as the Free Holders' Charter, which was amended in 1892. This charter as amended provides for the levy and collection of assessments for local improvements by the front foot plan. (Record, pp. 11, 16 and 20.) The new assessment was thereupon made under the Act of 1893 and the freeholders' charter. It was made on the front foot plan. This assessment is the one which respondent attacked in the present suit. Said assessment had been assailed in the courts of the State of Washington, and was finally adjudged valid in the Supreme Court of the State. (Record, p. 126.)

> *Bacon vs. The City of Seattle,* 15 Wash. 701; decided on the authority of Frederick vs. Seattle, 13 Wash. 428.

The assessment in question was made by Ordinance No. 3199, and the proceedings show a compliance with all of the statutory and charter requirements. (Record, pp. 25, 54, and 156 to 169, inclusive.) We do not understand that the regularity of these proceedings is questioned, but that the respondent relies upon the broad principle that assessment by front foot plan is in contravention of the Constitution of the United States, and that the assessment is likewise void, by reason of having included in the amount charged upon the property the cost of planking a portion of the street.

Ordinance No.3267 confirming this assessment was passed on the 5th day of March, 1894. (Record, p. 165.) The bill of complaint in this case was filed July 31, 1900. Appellant demurred to the bill on the ground that, admitting all the facts in the bill of complaint, there was no cause of action stated. The Circuit Court overruled the demurrer. Appellant answered, and after plaintiff's tes-

timony was in, moved to dismiss the suit. This motion was also denied. After all the testimony was in and argued, the court decreed that the assessment was invalid, but held in its memorandum of opinion that Weller street had been duly dedicated and was a public street across the tract of land in question.

From the order overruling the demurrer, and from the refusal to dismiss the action, and from that part of the decree declaring the assessment invalid, this appeal has been prosecuted.

An appeal was taken from the decree of the Circuit Court to the Circuit Court of Appeals, Ninth Circuit. The respondent moved to dismiss said appeal upon the ground that said Circuit Court of Appeals had no jurisdiction thereon. In dismissing said appeal, the Circuit Court of Appeals said: "The jurisdiction of the Circuit Court in this case was invoked, not upon the ground of diverse citizenship of the parties, but upon the ground that the case directly involved the construction of the 5th and 14th Amendments of the Constitution of the United States, in that, as alleged in the bill, the appellant, The City of Seattle, in a proceeding to appropriate a part of an unplatted tract of land for use as a public street, without compensation to the owner, and creating a lien upon the owners of other land abutting on said street, deprived the appellee of his property without due process of law."

The City of Seattle v. Thompson, 114 Fed. Rep. 96.

SPECFICATION OF ERRORS.

Appellant submits the following specification of errors:

1. The court erred in overruling the demurrer to the bill of complaint.

2. The court erred in refusing to dismiss the bill of complaint, and the action brought by complainant, at close of complainant's testimony, on the ground that plaintiff had not established any right of action against the respondent, or shown any ground for relief.

3. The court erred in decreeing that the assessment and re-assessment proceedings taken by the City of Seattle against the lands of complainant were null and void and of no effect, and that the lien claimed by the City of Seattle against said lands to defray their proportionate part of the cost of improving Weller street is invalid, and in granting an injunction restraining the City of Seattle and its officers from enforcing the collection of said assessment.

The errors assigned naturally give rise to the following legal questions, arising upon the pleadings and the evidence introduced herein:

1. Did the acts of W. C. Hill and wife operate as a dedication of Weller street across the tract of land in question, and if so, is respondent's administrator bound by said dedication?

2. Was the City of Seattle authorized by the act of the Legislature of March 9, 1893, and its freeholder charter to re-assess the cost of grading and sidewalking of Weller street upon the respondent's land, according to the front foot method?

3. Is the front foot method of levying assessments to pay the cost of local improvements in contravention of the Federal constitution; and,

4. If the next preceding query is answered in the affirmative, has the respondent pursued the proper remedy?

I.

DEDICATION OF WELLER STREET.

The learned trial Judge, upon the hearing on the merits, found that Weller street was a legally dedicated street across the land in question. (Record, p. 131.) The appellant would probably be justified in passing this question without any further comment, because no error is predicated upon that ruling of the court at the final hearing. The bill of complaint alleges the following facts in regard to this dedication:

"In the month of May, 1889, said W. C. Hill, however, signed and acknowledged before a notary public a town plat embracing the one hundred acres of land in question, and afterwards in said month of May, 1889, submitted the same to the City Council of said City of Seattle, and said City Council then and there approved said plat. Said plat was then taken by said W. C. Hill from said City Council, but neither he nor any other person ever filed the same for record in the Auditor's office of said King County. That none of the lands embraced within said plat were ever sold according to said plat. Said plat was called the 'W. C. Hill Addition to the City of Seattle,' and as it appears upon the face thereof, the land was divided into lots and blocks. There was laid out on said plat a street called Weller street, which coincided, for all practical purposes with Weller street as later laid out on said plate of Ben E. Snipes and wife, filed as aforesaid." (Record, pp. 9 and 10.)

The demurrer to the bill of complaint was overruled solely upon the ground that the facts above alleged did not constitute a common law dedication. Upon that point the lower court in its memorandum of decision on demurrer, says:

"I hold that city government has no right to appropriate any part of an unplatted tract of land for use as a public street without compensation to the owner, and creating a lien upon the owner's other land abutting upon the street projected in that manner for the expense of grading the street and building sidewalks. (See Crowley vs. The City of Spokane, 99 Fed. Rep. 842.) For this reason the demurrer must be overruled." (Record, p. 36.)

The bill of complaint shows in addition to the foregoing that Hill petitioned the Council for the improvement of Weller street across the tract of land in question, by grading and sidewalking. It shows that said petition was granted by the City Council and a contract awarded for the making of the improvement and the completion of the improvement prior to the 12th day of March, 1891. From these facts, the intention to dedicate and an acceptance by the city clearly appears. Under all authorities, those facts are sufficient to constitute a valid common law dedication.

Elliott on Roads and Streets, Chap. V., p. 85.
Dillon on Mun. Corp., 4th Ed., Vol. 2, Chap. XVII., p. 737.
5 Am. & Eng. Enc. of Law, Dedication, p. 395.
New Orleans v. U. S., 10 Peters, 662.
City of Cincinnati v. White, 6 Peters 431.
Godfrey v. City of Alton, 12 Ill. 29.
Surgeant v. Bank, 4 McLean (C. C.) 339.

An incomplete statutory dedication may become one at common law by acceptance by the public.

Fulton v. Mehrenfeld, 8 Ohio St. 440.
Maywood Co. v. Village of Maywood, 6 N. E. Rep. 866.

The owner is precluded from revoking such dedication.

Cincinnati v. White, supra.
61 Am. Dec. 221.
Heirs of David v. New Orleans, 79 Am. Dec. 586.
People v. Jones, 6 Mich. 176.

Privies in estate are bound to the same extent as grantors.

Warren v. Town of Jackson, 15 Ill. 236.
See also *Kenyon v. Knipe,* 2 Wash. 394.
Tilzie v. Haye, 8 Wash. 187.
Schettler v. Lynch, 64 Pac. Rep. 955.

The question as to whether the plat of W. C. Hill's Addition to the City of Seattle operated as a dedication of the streets and alleys shown thereon, including Weller street, has been before the Supreme Court of the State of Washington, and that court has held that said acts constituted a dedication of the streets and alleys shown upon the plat for the use of the public.

City of Seattle vs. Hill, 23 Wash. 92.

Another reason for overruling the demurrer suggested in the court's memorandum of opinion was, that certain planking upon the street was improperly charged against respondents' property.

There is no showing in the complaint that there was any additional cost to the abutting property by reason of the planking. It cannot be successfully claimed that an assessment is void and property escape the cost of improvement because in prosecuting it it was discovered it would be more economical and better for the property owners to put down a few yards of planking than to make a heavy and unnecessary earth filling.

But admitting that some work was improperly included, that would not vitiate the assessment. The authorities are very decided on that point. "Such assessment is not necessarily void because it includes items which should have been excluded; it may be valid in part."

Cincinnati v. Anchor White Lead Co., 44 Ohio St. 243.

"A street assessment which includes the cost of more work than had been authorized is not wholly void. It is good for the work properly included."

Dyer v. Scalmanini, 69 Cal. 637.

The fact that an improper item of cost was included in the assessment should not vitiate the entire assessment. The statute under which this re-assessment was made provides a reasonable and proper method in which objections to such items should be presented. That statute provides for the publication, in an official newspaper, a notice that such an assessment roll is on file, the date of filing of same, the time at which the council will hear and consider objections thereto by the parties aggrieved by such assessment. It likewise gives any person who has filed objections to such new assessment or re-assessment the right to appeal to the Superior Court of the State or county in which said city or town is situated. The proper time for objections to be presented against any item improperly included in the amount of the assessment is before the council, in pursuance of such notice. Should any one be dissatisfied with the assessment, and who has presented exceptions thereto failed to appeal to the proper court, his right to object to any such item is forever lost.

Tumwater vs. Pix, 18 Wash. 153.

New Whatcom vs. Bellingham Bay Imp. Co., 16 Wash. 131.

Annie Wright Seminary vs. Tacoma, 23 Wash. 109.

However this point may be, upon a consideration of the bill of complaint alone, it is eliminated in considering the case upon its merits. Paragraphs 5 and 6 of the bill of complaint (Record, p. 4), allege that the expense of the elevated roadway and the planking was assessed on the property abutting on said improvement. Paragraph 6 of the answer (Record, p. 40) "denies that it (the City of Seattle) at any time attempted to assess and levy, or that it did assess and levy, the whole cost of said improvement upon the property abutting thereon, but alleges the fact to be that the bridge begun by the above named contractor under the first contract entered into, as aforesaid, was removed, and the cost of materials furnished, labor performed thereon and the cost of removing said materials were all paid out of the road fund of said city. Respondent expressly denies that any part of the expense of erecting the said elevated roadway or bridge or of the removal of the same, or the cost of any of the materials used or labor employed thereon, was assessed in whole or in part to any of the property abutting on said improvement." Respondents introduced no testimony in support of the allegations of their complaint upon this point, and as the case now stands said allegations are not sustained.

In its memorandum of decision on the merits, the Circuit Court further says: "In the first place, the law in force at the time of doing this work did not authorize the city government to make the cost of planking streets a charge upon the abutting property."

The only law governing the case was an act of the State Legislature entitled, "An Act to revise and amend the charter of the City of Seattle," approved in 1886, and in force at the time Weller street was ordered improved. Section 8 of that act is as follows: "The City of Seattle shall have power to construct sidewalks and to curb, pave, grade, macadamize and gutter any street * * * and to levy and collect special taxes or assessments on all lots

and parcels of land fronting on any such street * * * so improved, or any part thereof sufficient to pay the expense of such improvement."

Webster defines "paving" as follows: "To lay or cover with stone, brick or other material, so as to make a firm, level, or convenient surface for horses, carriages or persons on foot to travel on."

The power to pave with any material certainly included the power to pave with wood, for that is what planking a roadway is, and especially in the country where wood is always understood to be the material used unless some other is specifically designated.

II.

We are unable to find from the record whether the right to make a re-assessment by a different method than that in force at the time the original assessment, has been seriously considered. Not having taken part in the original trial of this case, the writer of this brief is in the dark as to some of the points raised and discussed at that trial. If that question ever was a point in the case, we submit that it is settled by the decision of this Court in the case of Village of Norwood vs. Baker, 172 U. S. 293. In the course of its opinion in that case, this Court says: "Its legal effect, as we now adjudge, was only to prevent the enforcement of the particular assessment in question. It left the village, in its discretion, to take such steps as were within its power to take, either under existing statutes or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property for so much of the expense of opening the street as was found upon due and proper inquiry to be equal to the special benefits accruing to the property."

The Supreme Court of the State of Washington has passed upon this point in conformity with our contention.

Wilson vs. Seattle, 2 Wash. 543.

III.

Several methods of assessment for local improvements have been adopted throughout different sections of the United States. All have been more or less the object of adverse criticism. The method of assessing according to the front footage has been adopted by many of the states and leading cities of the Union, and experience shows that that method as nearly conforms to equity and justice as any that has ever been tried. It would be impossible to adopt any method which would not in certain isolated cases appear to be more or less unequal, but that fact does not render such assessment void. "It would be in any case impossible to accurately adjust the burden upon respective property holders in proportion to the benefit of the individual property of each and that power in practice might be woefully abused."

The question of adopting a method of levying assessments for local improvements lies purely in legislative discretion, and so long as that discretion is exercised in a reasonable manner, and gives parties interested an opportunity to be heard with the right to appeal to the courts from the determination of the city council, it cannot be said that there is a violation of the 14th Amendment of the Constitution of the United States. The Act of March 9, 1893, under which the assessment in question was made, provides for the publication of a notice in the official newspaper that the assessment roll is on file, the date of filing the same, the time at which the council will hear and consider objections thereto, and gives the owner or owners of any property affected thereby the right to file objections within ten days from the last publication thereof. At the time of hearing, the council shall hear and determine all objections which have been filed to the regularity of the proceedings, the correctness of the amount or of the

amount levied on any particular lot or parcel of land. The council also has authority to adjourn from time to time, and to revise, correct, confirm and set aside or to order the assessment or a writ to be made *de novo*. A simple method of appeal from the determination of the council to the Superior Court of the State is provided, and from the adjudication of the Superior Court an appeal lies to the Supreme Court of the State. It cannot be said that such a statute is arbitrary or will operate to deprive a person of his property without due process of law.

This case was heard by the Circuit Court while the country was still misunderstanding the effect and misconstruing the decision of the United States Supreme Court in the Village of Norwood case. How decidedly and logically that misconception has been cleared away by the series of decisions reported in 181 U. S. Rep. is well known to this Court. Only a slight reference to them is necessary; but for convenience the pertinent paragraphs of the syllabus is given in each case:

"It was not the intention of the Court in Norwood vs. Baker, 172 U. S. 269, to hold that the general and special taxing systems of the States, however long existing and sustained as valid by their courts, have been subverted by the Fourteenth Amendment to the Constitution of the United States; but the purpose of that amendment is to extend to the citizens and residents of the States the same protection against arbitrary state legislation, affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress."

Tonawanda vs. Lyon, 181 U. S. Rep. 389.

"A constitutional right against unjust taxation is given for the protection of private property, but it may be waived by those affected, who consent to such action to their property as would otherwise be invalid.

"The order of publication gave due notice of the filing of the petition in this case, and an opportunity to all persons interested to show cause why the prayer of the petition should not be granted; and operated as a notice to all concerned of the pending appointment of a jury, and that proceedings would be had under the act of Congress.

"The Court of Appeals, in regarding the decision of Norwood vs. Baker, 172 U. S., as overruling previous decisions of this court in respect to Congressional legislation as to public local improvements in the District of Columbia, is overruled."

Wright vs. Davidson, 181 U. S. Rep. 371.

"In this case the court proceeds on the assumption that the legal import of the phrase 'due process of law' is the same, both in the Fifth and in the Fourteenth Amendments to the Constitution of the United States; and that it cannot be supposed that it was intended by the Fourteenth Amendment to impose on the States, when exercising their powers of taxation, any more rigid or stricter curb than that imposed on the Federal Government by the Fifth Amendment in a similar exercise of power.

"It was not the intention of the Fourteenth Amendment to subvert the systems of the States pertaining to general and special taxation; that Amendment legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary state legislation affecting life, liberty and property as is afforded by the Fifth Amendment against similar legislation by Congress, and the Federal Courts ought not to interfere when what is complained of is the enforcement of the settled laws of the State, applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property, or deprivation of personal rights.

"The conclusions reached by this court in many cases cited and summarized by the Court in its opinion are thus stated by two writers (Cooley and Dillon), whose views

this Court adopts: 'The major part of the cost of a local work is sometimes collected by general tax, while a smaller portion is levied upon the estates specially benefited. The major part is sometimes assessed on estates benefited, while the general public is taxed a smaller portion in consideration of a smaller participation in the benefits. The whole cost in other cases is levied on lands in the immediate vicinity of the work. In a constitutional point of view, either of these methods is admissible, and one may sometimes be just, and another at other times. In other cases it may be deemed reasonable to make the whole cost a general charge, and levy no special assessment whatever. The question is legislative, and, like all legislative questions, may be decided erroneously; but it is reasonable to expect that, with such latitude of choice, the tax will be more just and equal than it would be were the legislature required to levy it by one inflexible and arbitrary rule.'

"The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power, or included within it * * * Whether the expense of making such improvements shall be paid out of the general treasury or be assessed upon the abutting or other property specially benefited, and, if in the latter mode, whether the assessment shall be upon all property found to be benefited, or alone upon the abutters, according to the frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency.

"Norwood vs. Baker, 172 U. S. 269, considered, and held not to be inconsistent with these views."

French vs. Asphalt Paving Company, 181 U. S. Rep. 325.

The United States Supreme Court has been quite consistent in its sanction of the front foot method, and the decision in the Village of Norwood case was both just in itself and in harmony with its other decisions. There is a

great difference between the case of taking land from an unwilling owner in order to make a public street, and the case of grading and planking it afterward for the benefit of homes and business houses to which the improvement gives access.

There is nothing in the front foot method repugnant either to the Constitution of the United States, to the State constitutions and laws, to the decisions of the courts or to the conclusions of practical experience.

The United States Supreme Court long ago gave its approval to statutes authorizing the front foot method; and, coupling with it the dictum that the method of levying an assessment for improvements was a matter wholly within the power of State Legislatures, gave its sanction to a now widespread and long-established custom.

In the case of Walston vs. Nevin (128 U. S. Reports, 580), 1880, that court had under review a statute of the Commonwealth of Kentucky, 1882, in which it was enacted:

"Sec. 2. When the improvement is the construction of any street, road, lane, alley, or avenue, such improvement shall be at the exclusive cost of the owner of lots in each fourth of a square, to be equally apportioned by the general council *according to the number of square feet owned by them respectively*, except that corner lots (say thirty feet front and extending back as may be prescribed by ordinance) shall pay twenty-five per cent. more than others for such improvement. Each subdivision of territory bounded on all sides by principal streets shall be deemed a square."

Chief Justice Fuller, delivering the decision, said:

"The statute has been *repeatedly* before the Kentucky Court of Appeals, which has sustained it as constitutional and proper legislation, the powers vested thereby in the

local improvement being subjected to the supervision of the courts."

This was in direct comment upon the plea that such a method was in conflict with Section 1 of the Fourteenth Amendment of the United States Constitution.

The United States Supreme Court, in the case of Walston vs. Nevin, 128 U. S. Reports, p. 582, quoted at length from Mr. Justice Miller, in Davidson vs. New Orleans, 96 U. S. 97-104, as saying that:

"Whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed on property for public use, whether it be for the whole state or of some limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary court of justice, with such notice to the person, or such proceedings in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

And the conclusion was reached, said Chief Justice Fuller, in comment thereon, that neither the corporate agency by which the work is done, the *excessive price which the statute allows therefor nor the relative importance of the work, the value of the land assessed,* nor that the *assessment is unequal as regards the benefits conferred* are matters in which the State authorities are controlled by the Federal Constitution. So the determination of the taxing district and the manner of the apportionment are all within the legislative power.

Spencer vs. Merchant, 125. U. S. 345.
Stanley vs. Supervisors, 121 U. S. 535-550.
Mobile vs. Kimball, 102 U. S. 591.

Hagar vs. Reclamation District, N. O. 108, 111 U. S. 107.

United States vs. Memphis, 97 U. S. 284.

Laramie vs. Albany Co., 92 U. S. 307.

It is worth noting that Chief Justice Fuller went so far as to say:

"The remedy for abuse is in the State courts, for, in the language of Mr. Justice Field in Mobile vs. Kimball, 'This court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal, and oppressive State legislation.'"

"But neither is taxation for a public purpose, however great, the taking of public property for public use, in the sense of the Constitution. Taxation only exacts a contribution from the individuals of the State or of a particular district, for the support of the government, or to meet some public expenditure authorized by it, for which they receive compensation in the protection which government affords, or in the benefits of the special expenditure. But when private property is taken for public use, the owner receives full compensation. In the one case, the party bears only a share of the public burden; in the other, he exchanges his property for its equivalent in money. The two things are essentially different."

County of Mobile vs. Kimball, 102 U. S. 703 (1880).

"It is insisted that the basis of the assessment upon the lands benefited, for the cost of the construction of the work, is not in accordance with, and in proportion to, the benefits conferred by the improvement; and therefore there is a violation of the constitutional amendment referred to, and a taking of the property of the citizen without due process of law. Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation. Whatever ob-

jections may be urged to this kind of assessment, as being in violation of the State constitution, yet, as the State court has held them to be without force, we follow its judgment in that case, and our attention must be directed to the question whether any violation of the Federal Constitution is shown in such an assessment. Can an *ad valorem* assessment on the land benefited, or, in other words, can such an assessment as is provided in Secs. 18, 20, 21, and 22 of the act be legally levied in such a case as this?

"Assumed that the only theory of these assessments for local improvement upon which they can stand is that they are imposed on account of the benefits received, and that no land ought, in justice, to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry.

"Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and where the fact of some benefit accruing to all the lands has been legally found, can it be that the adoption of an *ad valorem* method of assessing the lands is to be held a violation of the Federal Constitution? It seems to us clearly not. It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land, with regard to the benefits it has received, which is open to the discretion of the State Legislature, and with which this court ought to have nothing to do. The way of arriving at the amount may be in some instance inequitable and unequal, but that is far from rising to the level of a constitutional problem, and far from a case of taking property without due process of law."

Fallbrook Irrig. Dist. vs. Bradley, 164 U. S. 176.
Parsons vs. Dist. Columbia, 170 U. S. 51.

"The rule of apportionment among the parcels of land benefited also rests within the discretion of the Legisla-

ture, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits."

Mattingly vs. Dist. of Columbia, 97 U. S. 687.
Spencer vs. Merchant, 125 U. S. 345.
Walston vs. Nevin, 128 U. S. 578.
Shoemaker vs. United States, 147 U. S. 282.
Paulsen vs. Portland, 149 U. S. 30.
Fallbrook Dist. vs. Bradley, 164 U. S. 176.

(All of these citations are made in Bauman vs. Ross, 167 U. S. 590, with approval.)

"Neither the corporate agency by which the work is done, nor the relative importance of the work, nor that the assessment is unequal as regards the benefits conferred, are matters in which the State authorities are controlled by the Federal Constitution."

Davidson vs. New Orleans, 96 U. S. 97.

"The bill charges (p. 689) that assessments according to the frontage of the street were unauthorized and illegal. Congress may legislate within the district, respecting the people and property therein, as may the Legislature of any State over any of its subordinate municipalities. There were also acts of the legislative assembly of the district, which very forcibly imply a confirmation of the acts and assessments of which the bill complains.

"Special assessments for street improvements very often are oppressive. But that the legislative power may authorize them, and may direct them to be made in proportion to the frontage, area, or market value of the adjoining property, at its discretion, is, under the decisions, no longer (1878) open to controversy."

Mattingly vs. Dist. of Columbia, 97 U. S. 687.

"The enactment by Congress that assessments levied for laying water mains in the District of Columbia should

be at the rate of $1.25 *per lineal front foot* against all lots or land abutting upon the street, road, or alley in which a water main shall be laid, is conclusive alike of the necessity of the work and of its benefit as against abutting property.

"If the assessment for laying such water mains exceeds the cost of the work it is not thereby invalidated."

Parsons vs. Dist. of Columbia, 170 U. S. 45.

"The police power of a State is as broad and plenary as the taxing power (as defined in Coe vs. Errol, 116 U. S. 517), and properly within the State is subject to the operation of the former as long as it is within the regulative restriction of the other."

Kidd vs. Parsons, 128 U. S. 1.

"It has been said that the benefits derived from the grading and paving of a street are sometimes fanciful and imaginary, and always uncertain and incapable of being estimated with that exactness which is necessary for the purpose of justice to the individuals assessed. But this is a consideration to be addressed to the Legislature, and not to the judicial authorities. The courts cannot assume that this proposition is true in point of fact. The Legislature has evidently acted on the belief that it is untrue. That mistakes may have happened, and that abuses may have been practiced, and that injustice may have been done in making street assessments, it is not necessary to deny. Mistakes, abuses, and injustice have often occurred in general taxation. These are not grounds on which either system of supplying the public treasury can be denounced as unconstitutional. If the systems are imperfect, they should be reformed by the Legislature. If street assessments are in their practical operation oppressive and unjust, the statutes which authorize them should be repealed. The remedy for unjust or unwise legislation is not to be administered by the courts. It remains in the hands of the people; and it is to be wrought out by means of

a change in the representative body, if it cannot be otherwise obtained."

People vs. Mayor of Brooklyn, 55 Am. Dec. 276.

"This subject (mode of assessment) has been treated at some length elsewhere in this work, but Judge Dillon, after a careful review of the authorities, has so admirably and concisely stated the law governing this system or mode of assessment for street improvements, that it cannot be out of place to give the result of his investigation in his own words: 'When not restrained by the Constitution of the particular State, the Legislature has a discretion commensurate with the broad domain of legislative power in making provisions for ascertaining what property is specially benefited and how the benefit shall be apportioned. The assessments may be made upon all the property specially benefited by the particular improvement according to the exceptional benefit each lot or parcel of property actually and separately receives.

"Where the property is urban, and has been platted into blocks, with lots of equal depth which abut the local improvement for which the assessment is made, and there are no special constitutional restrictions in the way, and nothing in the nature and circumstances of the particular case to make an assessment in proportion to the frontage of the lots upon the improvement work manifest injustice, it is generally, but not always, regarded as within the competency of the Legislature to provide that it may be so made."

24 A. & E. Encycl. of Law (1st Ed.), 71.

"All the streets have been made many years prior to the incorporation of the city; most of them had been graded and paved prior to the year 1826, and always in the mode now objected to as unconstitutional. Other cities in the United States, as well as in Europe, have been improved in a similar manner; this mode and this usage, in towns and cities, may have been generally understood when our Constitution was adopted. The Eleventh Sec-

tion of the charter of Lexington only re-enacted what had been the established rule respecting its streets and sidewalks. The citizens were familiar with that rule, and, thus understanding it, they accepted the charter as it is.

"Under a proper view of all the foregoing considerations, can this court decide that the ordinance now sought to be invalidated is unconstitutional and void? (The mode of apportionment was by the front foot.)

City of Lexington vs. McQuillan, 35 Am. Dec. 161 (Ky.).

"This part of the plaintiff's case rests on the broad proposition that the Legislature have no power to authorize the assessment of the cost of a work of a public nature, but the construction of which will be of special and peculiar benefit to adjacent property on the abutting estates in proportion to their value. For the reasons already given, we are of opinion that such a tax is neither unreasonable nor unproportional, and that it was competent for the Legislature to impose it in the mode prescribed by the statute.

"We are greatly strengthened in this conclusion by the consideration that such a mode of assessment of taxes for similar objects has been adopted and carried into effect *without doubt or question* in this commonwealth, both under the colonial government and since the adoption of the constitution."

Dorgan vs. City of Boston, 94 Mass. (12 Allen), 238.

The eminence of the court adds value to this opinion.

It is admitted that in some states it has been held that the front-footage rule of assessments is unconstitutional as a violation of the constitutional provision requiring equality and uniformity in taxation. But the greatest authority upon constitutional questions in this country, Thomas M. Cooley, has laid down a principle, based upon sound rea-

soning, which has been adopted so generally that it has become a part of the Common Law of the United States. He says:

"In local taxation, however, for special purposes, the local benefits may in many cases be seen, traced and estimated to a reasonable certainty. At least this has been supposed and assumed to be true by the Legislature, whose duty it is to prescribe the rules on which taxation is to be apportioned, and whose determination of *this matter*, being within the scope of its lawful power, is conclusive."

Cooley on Const. Limitations, 6th Ed., p. 623.

"Where the Legislature has invested a municipal body with power to provide by ordinance for assessing the cost of an improvement upon the property benefited, if such body adopts the rule of frontage as the rule of apportionment, the courts cannot, without statutory authority to do so, interfere with the determination, unless a clear case of abuse is made out."

Baltimore vs. Johns Hopkins Hospital, 56 Md. 1; overruling *Baltimore vs. Scharf*, 54 Md. 499.

Judge Cooley cites with approval the decision of the Ohio court in Northern Indiana R. R. Co. vs. Connelly, 10 Ohio St. 159, in which it is held:

"The rule of apportionment, whether by the front foot or a percentage upon assessed valuation, must be uniform, affecting all the owners and all the property abutting on the street alike. * * * It is manifest that the actual benefits resulting from the improvement may be as various almost as the number of the owners, and the usage to which the property may be applied. * * * The Legislature have not attempted so vain a thing." * * *

Judge Cooley follows this up by saying (Const. Lim., p. 624):

"And on the like reasoning, it has been held equally competent to make the street a taxing district, and assess

the expense of the improvement upon the lots in proportion to the frontage. Here also is apportionment by a rule which approximates to what is just, but which, like any other rule that can be applied, is only an approximation to absolute equality. But if, in the opinion of the Legislature, it is the proper rule to apply to any particular case, the courts must enforce it."

Judge Cooley goes on to show that the method of fairest apportionment, according to outward appearance, would be to assess against each lot the cost of the work in front of that particular lot, but, he says, "it requires but slight examination to discover that it is a deceptive semblance only, and that the measure of equality which the Constitution requires is entirely wanting. * * * It would be nakedly an arbitrary command of the law to each lot owner to construct the street in front of his lot at his own expense, according to a prescribed standard; and a power to issue such command could never be exercised by a constitutional government unless we are at liberty to treat it as a police regulation, and place the duty to make the streets upon the same footing as that to keep the sidewalks free from obstruction and fit for passage." He adds, and we consider it fair to call attention to this fact, without endorsing it, that "any such idea is clearly inadmissible."

In addition to the foregoing authorities, the Court's attention is invited to the following decisions of state courts of last resort and expressions of text writers:

2 Dillon Municipal Corporations, 2nd Ed., Sec. 761.
Elliott on Roads and Streets, pp. 391-392.
Cooley on Taxation, 2nd Ed., p. 644.
Whiting vs. Townsend, 57 Cal. 515.
Emory vs. San Francisco Gas Co., 28 Cal. 345.
Hayden et al. vs. City of Atlanta, 70 Ga. 817.
Bacon vs. Mayor of Savannah, 32 A. & E. Corpn. Cs. 244.

Springfield vs. Green, 120 Ill. 269.
Palmer vs. Stumph, 29 Ind. 337.
Amery vs. Keokuk, 72 Iowa, 701.
Baltimore vs. Johns Hopkins Hospital, 56 Me. 1.
Sheley vs. Detroit, 45 Mich. 431.
Farrar vs. St. Louis, 80 Mo. 379.
Sigler vs. Fuller, 34 N. J. L. 232.
O'Reilly vs. Kingston, 114 N. Y. 439.
Roberts vs. First Nat. Bank, 8 N. D. 504.
Upington vs. Treasurer, 24 Ohio St. 232.
King vs. City of Portland, 2 Ore. 147.
McGee vs. Commonwealth, 46 Pa. 538.
Harrell vs. Storrie, 47 S. W. 838.
Davis vs. Lynchburg, 84 Va. 861.
Austin vs. Seattle, 2 Wash. 669.
Weeks vs. City of Milwaukee, 10 Wis. 243.

The foregoing are only a few of the cases from the states bearing upon the question at issue.

IV.

The Act of March 9, 1893, provides that the decision of the city council shall be a final determination of the regularity, validity and correctness of the reassessment, and provides for an appeal from that decision. In case any property owner is dissatisfied with the assessment, it is incumbent upon him to file his objections with the council and appeal from their determination to the Superior Court. In case he fails to do this, the assessment will stand as against his property.

Nearly seven years intervened from the time this assessment was made, and nine years from the time respondent's rights attached to the land before this proceeding was instituted. Respondent had full notice that the

streets had been improved and had constructive notice that the cost of said improvement had not been paid by the abutting property. It would be inequitable and unjust now to allow him to escape the payment of this cost when he has received the benefit of the work.

In a Washington case between the City of Seattle and the grantor of the present respondent, covering the same tract of land and relating to a parallel street, the Supreme Court of that State said:

"It is clear that the common council possessed jurisdiction to order the improvement and levy the assessment, and it appears that all the notices required by the general ordinances to be given to property owners were published in the official newspapers of the city for the required time. In view of these facts and the provisions of Section 10 of the charter, it would seem that the assessment was properly held valid, 'notwithstanding any defect, informality, or irregularity in the proceedings.'

"And, besides, we are of the opinion that the appellants ought not to be heard to complain of defects and irregularities in the assessment proceedings. The party through whom they derived whatever title they have to the land was actively instrumental in inducing the proceedings which are now called in question, and it is not shown anywhere in the record that he ever made the slightest objection to the mode of levying the assessment, or the amount thereof, or even to the character of the work.

"It is not necessary at this time to determine whether the mere failure on the part of one whose land is being assessed for a local improvement, and who has not himself requested the municipality to make it, to object to the proceedings at the proper time, will preclude him from afterwards objecting, as some courts seem to have held, for that question is not properly in this case. But we are constrained to hold that, after a person has signed a petition for an improvement, which can only be paid for by means of an assessment on contiguous property, he is estopped

from contesting the validity of the assessment, especially after the work has been completed and accepted by the proper authorities.

Cooley, Tax'n, p. 819.
Ball vs. Tacoma, 9 Wash. St. 592, 38 Pac. 133.
Motz vs. City of Detroit, 18 Mich. 495.
Wood vs. Norwood Tp., 52 Mich. 32, 17 N. W. 229.
Ricketts vs. Spraker, 77 Ind. 371.
Patterson vs. Baumer, 43 Iowa 477.
Ferson's Appeal, 96 Pa. St. 140.
Elliott, Roads & S., 423.

"It will be seen from what we have said that at the time these appellants acquired their title to the land in controversy there was a valid assessment against it appearing of record, and of which they may be deemed to have had at least constructive notice. They received the benefits resulting from the improvement, and must be held to have taken the land subject to the consequent burden."

City of Seattle vs. Hill, 62 Pac. 448.

The Supreme Court of the State of Indiana in Evansville vs. Pfisterer, 34 Ind. 36, 7 Am. Rep. 214, uses the following language:

"And in such cases the party who makes the complaint must apply to the courts as soon as the facts come to his knowledge, showing that a tax about to be levied, or an assessment for an improvement about to be made, is illegal. He must not sleep on his rights; he can not lie quietly by and knowingly let work be done for which a tax will be levied or an assessment made, and after the work is completed and his property thereby improved, come into a court of equity and obtain relief against the tax or assessment because the same is illegal or void. He is estopped by his negligence and laches."

Elliott on Roads and Streets, pages 420, 421, says:

"If he (the property owner) has knowledge of the proceedings, and knows that the work is being done under

them, he can not avoid knowing what the law authorizes, and if he knows all this he ought to properly object or else pay the assessment, unless subsequent acts made it invalid. The fact that a street is being improved by public officers ought to put the owner on inquiry, and to him should be applied the familiar rule that one put upon inquiry is chargeable with notice of all the facts which a reasonably diligent investigation will disclose. Public works are undertaken, as every one knows, under authority delegated by law to the public officers, and there is little or no reason why a particular owner, who has full notice of what is being done, should be allowed to stand by in silence until the work is completed, and then escape paying for the benefit his property has received. If he would avoid this result he should act promptly, and if he fails he should not demand that the persons who have done the work should go unpaid."

The Supreme Court of Massachusetts, in the case of Tash vs. Adams, 10 Cush. 252, uses almost the same language as in Evansville vs. Pfisterer, *supra:*

"It would certainly be inequitable and unjust to allow one to sleep on his right, with full knowledge of all that was being done, and that his property was being improved and benefited, and then, after the improvement was completed and his property benefited thereby, and expense had been incurred which must necessarily be met and paid from some source or other, to come into a court of equity and say: 'It is true I knew all that was going on, that my property was being benefited by the improvement being made, that I made no objection whatever, that I am willing to accept all benefits incurred, but I am not willing to pay therefor, because, forsooth, the proceedings under which the improvements were made were not strictly legal, and the public officers did not follow and strictly comply with the law authorizing such improvements to be made; therefore I ask the Court, as a matter of equity and justice, to relieve me from the payment of the whole and every part of the assessment levied on my said property.'"

The Supreme Court of Washington has adopted the same doctrine as the cases above cited and has spoken in no uncertain terms in a similar case, that of Wright vs. City of Tacoma, 19 Pac. Rep. 45. The Court says:

"After the city had entered into contract, the work would be done at all events, and at the expense of all taxpayers within the city, if not done under these proceedings. Thus, appellant, by remaining silent when good faith would require him to speak, would gain the advantage of having his street improved at the expense of others. This would be a moral fraud.

"In Powers vs. New Haven, 120 Ind. 185, the Court said: 'It is now quite settled that if the owner of property in a city stands by and permits improvements to be made which benefits such property, and makes no objection to such improvement, he will be estopped from denying the authority of such city to make the improvements.'"

Taber vs. Ferguson, 109 Ind. 227.
Ross vs. Stackhouse, 114 Ind. 200.
Jenkins vs. Stetler, 118 Ind. 275.
Johnson vs. Allen, 62 Ind. 57.

"It would be inequitable to permit a party to stand by and permit others to make improvements for the benefit of his property, without objection, and hold such benefits and refuse to pay for the same. We see no reason why the doctrine should not be applied to improvements made in towns as well as cities."

11 A. & E. Encycl. of Law, 2d Ed., 429.

V.

The recent case of Hibben v. Smith, in which a decision was handed down by this court Nov. 30, 1903, seems to be conclusive of all of the questions involved in the case at bar. In that case, as in this, an assessment by the front

foot for local improvements was assailed, upon the ground that the statute under which the assessment was levied was in contravention of the 14th Amendment of the Federal Constitution.

The relief sought by the respondent is based solely upon the violation of the 5th and 14th Amendments of the Federal Constitution. (Paragraph 21 of complaint, Record, p. 13.)

The circuit judge, both in passing upon the demurrer to the complaint (Record, p. 36), and in its memorandum of decision on the merits (Record, p. 131), based its decisions solely upon constitutional grounds.

The statute of Washington authorizing an re-assessment gives to the parties interested a hearing, or what is equivalent thereto, an opportunity to be heard after notice; and also an appeal to the Superior Court, and from this to the Supreme Court of the State. The statute construed in Hibben v. Smith, *supra*, so far as we are able to judge from the opinion, gave property owners an opportunity for hearing before the city authorities, but not an appeal to the courts. In this respect the Washington statute is a much more liberal one than that of the State of Indiana, passed upon in the above cited case. In the course of its opinion in the Hibben case, this court uses the following language: "The amount of benefits resulting from the improvement is a question of fact, and a hearing upon it being assumed, the decision of the board is final. No constitutional question of a federal nature arises therefrom."

"Due process of law is afforded where there is opportunity to be heard before the body which is to make the assessment, and the legislature of a state may provide that

such hearing shall be conclusive so far as the federal constitution is concerned."

"Due process of law is not violated, and the equal protection of the laws is given when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the state, and where the party who has subsequently been charged in his property, has had a hearing or an opportunity for one provided by the statute."

From the foregoing discussion and authorities, appellants submit that there is no federal question involved in this suit, and that for reasons herein set forth, the Circuit Court erred in rendering the decree from which this appeal is taken.

We therefore respectfully submit that the decree be reversed.

WALTER S. FULTON,
Solicitor for Counsel.
MITCHELL GILLIAM,
Of Counsel.

APPENDIX.

AN Act relating to and authorizing the collection of assessments for local improvements by a new assessment or re-assessment of the cost and expense of making same in cities and towns, and declaring an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Section 1. That whenever an assessment for laying out, establishing, closing, straightening, altering, widening, grading, regrading, paving, re-paving, planking, replanking, sidewalking and bridging, macadamizing, remacadamizing, graveling, re-graveling, piling, re-piling, capping, re-capping, any street, avenue, or alley, or for any local improvement, which has heretofore been made or which may hereafter be made by any city or town, has been or may be hereafter declared void and its enforcement under the charter or laws governing such city or town refused by the courts of this State, or for any cause whatever has been heretofore or may be hereafter set aside, annulled or declared void by any court, either directly or by virtue of any decision of such court, the council of such city or town shall, by ordinance, order and make a new assessment or re-assessment upon the lots, blocks or parcels of land which have been or will be benefited by such local improvement, to the extent of their proportionate part of the expense thereof, and in case the cost shall exceed the actual value of such local improvement the new assessment or re-assessment shall be for and based upon the actual value of the same at the time of its completion; and to this end the board of public works or other proper authority of such city or town shall make a new assess-

ment roll in equitable manner with reference to the benefits received, as near as may be in accordance with the law in force at the time such re-assessment is made, and when the same shall have been confirmed and approved by the council it shall be enforced and collected in the same manner that other assessments for local improvements are enforced and collected under the charter or laws governing such city or town; but all proceedings relative to making the expense of local improvements chargeable upon property benefited thereby, required and provided by the charter or laws of such city or town prior to the making of original assessment roll, shall not be included nor required within the purpose of this act.

Sec. 2. The city council of such city or town shall by ordinance order and make a new assessment or re-assessment, as provided in preceding section, upon the lots, blocks, or parcels of land, which have been or will be benefited by such improvement, to the extent of their proportionate part of the cost, expense and value thereof.

Sec. 3. Upon the passage of an ordinance, as hereinbefore provided, the board of public works, or other proper authority of such city or town, shall make out an assessment roll according to the provisions of the said ordinance, and shall certify the same to the council of such city or town.

Sec. 4. Upon receiving the said assessment roll, the clerk of such city or town shall give notice by three (3) successive publications in the official newspaper of such city or town, that such assessment roll is on file in his office, the date of filing of same, and said notice shall state a time at which the council will hear and consider objections to said assessment roll by the parties aggrieved by such assessment. The owner or owners of any property

which is assessed in such assessment roll, whether named or not in such roll, may within ten (10) days from the last publication provided herein, file with the clerk his objections in writing to said assessment.

Sec. 5. At the time appointed for hearing objections to such assessment, the council shall hear and determine all objections which have been filed by any party interested, to the regularity of the proceedings in making such assessment and to the correctness of the amount of such re-assessment, or of the amount levied on any particular lot or parcel of land; and the council shall have the power to adjourn such hearing from time to time, and shall have power, in their discretion, to revise, correct, confirm, or set aside, and to order that such assessment be made de novo, and such council shall pass an order approving and confirming said proceedings and said re-assessment as corrected by them, and their decision and order shall be a final determination of the regularity, validity and correctness of said re-assessment, or the amount thereof, levied on each lot or parcel of land. If the council of any such city consists of two houses, the hearing shall be had before a joint session, but the ordinance approving and confirming the re-assessment shall be passed in the same manner as other ordinances.

Sec. 6. The fact that the contract has been let or that such improvement shall have been made and completed in whole or in part shall not prevent such assessment from being made, nor shall the omission, failure or neglect of any officer or officers to comply with the provisions of the charter or laws governing such city or town, as to petition, notice, resolution to improve, estimate, survey, diagram, manner of letting contract or execution of work, or any other matter whatsoever connected with the improvement and the first assessment thereof, operate to invalidate or

in any way affect the making of the new assessment or re-assessment as provided for by this act, charging the property benefited with the expense thereof: PROVIDED, That such new assessment shall be for an amount which shall not exceed the actual cost and value of the improvement, together with any interest that shall have lawfully accrued thereon, and that such amount be equitably apportioned upon the property benefited thereby, according to the provisions of the charter or laws of such city or town. It being the true intent and meaning of this act to make the cost and expense of all local improvements payable by the real estate benefited by such improvement by making a re-assessment therefor, notwithstanding that the proceedings of the common council or board of public works or any of its officers may be found irregular or defective, whether jurisdictional or otherwise; when such reassessment is completed all sums paid on the former attempted assessment shall be credited to the property on account of which the same was paid.

Sec. 8. Any person who has filed objections to such new assessment or re-assessment, as hereinbefore provided, shall have the right to appeal to the Superior Court of this State and county in which such city or town may be situated.

18920

Supreme Court of the United States

OCTOBER TERM, 1903

No. 274.

CITY OF SEATTLE, APPELLANT,

vs.

JOHN W. THOMPSON,

BRIEF ON MOTION TO DISMISS

Daniel Kelleher, as administrator of the deceased appellee, Thompson, appears specially for the purpose of this motion only and moves the court for an order dismissing this appeal for want of jurisdiction. This motion is based upon the record and upon the affidavit of the aforesaid administrator served herewith.

FRED'K BAUSMAN,
Appearing specially as Counsel for Daniel Kelleher as Administrator.

To the above named appellant and to Messrs. Mitchell Gilliam and Scott Calhoun, your counsel:

You and each of you will please take notice that the above named administrator will call up the foregoing for hearing on Monday, October 19, 1903, at the opening of court, or as soon thereafter as counsel can be heard.

FRED'K BAUSMAN,
Specially appearing as Counsel for Daniel Kelleher, Administrator.

Received copy of this motion (with affidavit) and notice, August 11, 1903.

MITCHELL GILLIAM,
Counsel for Appellant.

STATEMENT.

The affidavit annexed to the motion to dismiss and duly filed in this court sufficiently states our grounds. Omitting its caption and verification, Mr. Kelleher's statement is as follows:

"I am, and during thirteen years last past have been, a resident of the City of Seattle, County of King, State of Washington, and continuously engaged in the practice of law in that city."

"This cause was begun in the Circuit Court during the lifetime of John W. Thompson, and before his death the decree now appealed from by the City was entered in his favor. The date of the signing and filing of the decree was June 22, 1901. The death of deceased Thompson occurred July 11th following. By his will the American Security and Trust Company of the District of Columbia was created, and ever since has been the duly qualified and public trustee of his estate. In addition thereto this affiant was, by the Superior Court of King County, State of Washington, on August 6th following, appointed administrator,

and ever since has been legally and publicly administrator, of the estate within this State of Washington.

"The only proceedings by the city known to this affiant are an appeal by it to the Circuit Court of Appeals for the Ninth Circuit, taken October 24th following the decree and the death of deceased Thompson, which appeal upon motion was by that court, on the 24th day of February, 1902, dismissed for want of jurisdiction, on the ground that jurisdiction of this cause on appeal was vested exclusively in the Supreme Court. Thereafter nothing was done by the city until the present appeal in January, 1903.

"At no time has anything been done by the city in either this court or in the Circuit Court of Appeals towards substituting either of deceased Thompson's representatives in this cause or towards reviving or continuing it against either or both of them according to the rules of court and the law. Otherwise than by the motion in the Circuit Court of Appeals to dismiss for want of jurisdiction, neither this affiant nor the other representative of decedent has in any wise participated in or consented to the appellate proceedings at all."

The material dates in the foregoing affidavit appear in the extracts from the record printed for the purpose of this motion. This affidavit, served on August 11th last, has not, up to this 22d of September, been met with any denials, and we may assume that its brief allegations will be conceded to be true.

BRIEF.

Rule 15 of this court provides for two contingencies upon death after decree in the lower court. The first is where death occurs while the appeal is pending, the second when it occurs before the appeal is taken. The present situation is the latter. Thompson's death occurred about a year and a half before this appeal.

Let us turn, then, to the rule. Its section 3 provides for very deliberate process by those who appeal against the dead. If there resides in the district where the judgment was rendered no legal representative, recourse must be had to this court for order and advertisement. Suppose, though, that there does reside a representative in the district where the decree was rendered? Then the suit is to be revived. This the rule plainly indicates. And revived how? According to Equity Rule 56, we should say, since revivor for purpose of appeal only, upon death after decree, was a well understood practice (*Anderson v. White*, 10 Paige 575; *Pier v. Cookerow*, 13 N. J. Eq. 136).

Just whether this second provision of Rule 15 survives section 9 of the Judiciary Act of 1875 (left unrepealed by the act of 1887) is immaterial. That section provides that when the death occurs before appeal, the proceedings to get the representatives in shall be the same as those upon death after appeal. Very good. Let us suppose Thompson's death to have occurred after appeal by the city. What should the city have done? It should have obtained an order from this court in such season as to have had it advertised "for three consecutive weeks at least sixty days before the beginning of the term of the Supreme Court then next ensuing." This has neither been done nor begun, nor can it now be accomplished.

Accordingly, under any aspect of the statute and the rule, this case would seem to come squarely within *Dolan v. Jennings*, 139 U. S. 382, decided in 1891 with all existing provisions in force. See also *Bigler v. Waller*, 12 Wall 147.

The city has shown great negligence here. After the dismissal by the Circuit Court of Appeals in February, 1902 (*City of Seattle v. Thompson*, 114 Fed. 96), had pointed out the true court to appeal to, it waited eleven

months, until January, 1903, to take out this appeal from a decree of June, 1901. It has since waited eight months more without any attempt to comply with a very reasonable rule. Meanwhile, we have the absurdity of an appeal taken after death, together with a citation and a bond addressed to the dead.

Respectfully submitted,

FREDERICK BAUSMAN,
Specially appearing as Counsel for Daniel Kelleher, Administrator.

Received copy of this brief this 11th day of August, 1903.

MITCHELL GILLIAM,
Counsel for Appellant.

18920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

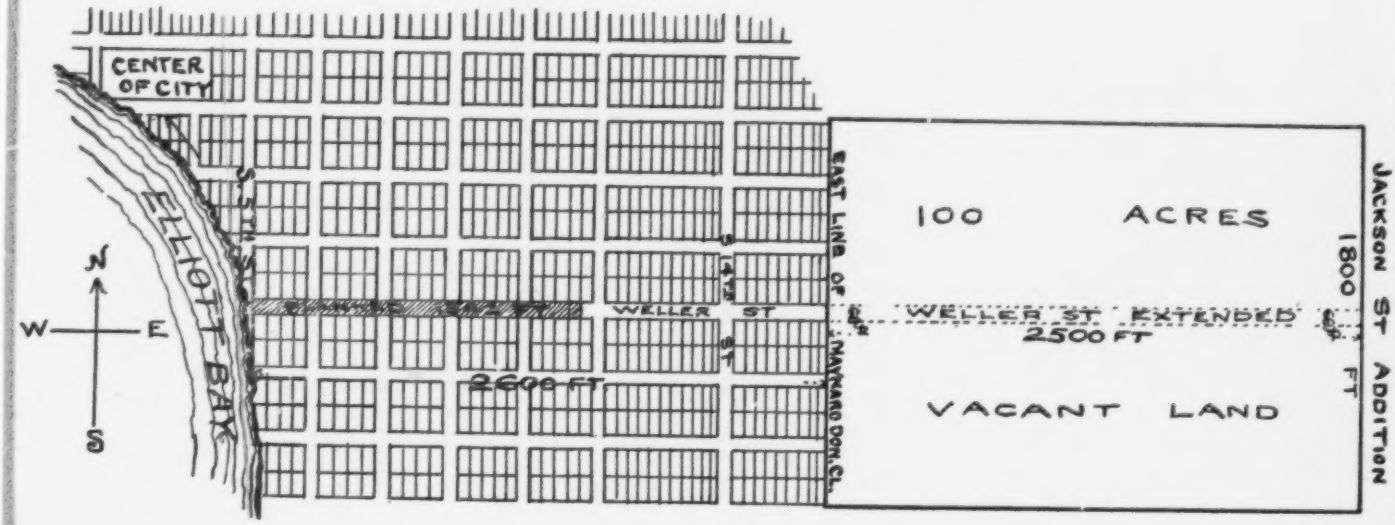
No. 274.

CITY OF SEATTLE, *Appellant,*

vs.

DANIEL KELLEHER, as Administrator of the Estate of JOHN W. THOMPSON, *Appellee.*

BRIEF OF APPELLEE.


CENTER OF CITY
ELLIOTT BAY
N
W
E
S
WELLER ST
2600 FT
EAST LINE OF E½ MAYNARD DON. CL.
100 ACRES
WELLER ST EXTENDED
2500 FT
VACANT LAND
1800 FT
JACKSON ST ADDITION

STATEMENT OF THE CASE.

We have inserted at the opening of this brief a diagram showing the location of the property to enable the court to follow the argument.

Thompson, the deceased, owned in Seattle a tract of 100 acres, which he had got by foreclosure from one Snipes, who, in turn, had got it from a certain Hill. As the city is seeking to bind Thompson for things done in the time of Hill, it is necessary to go back to that time. Hill in 1889, while he still owned the tract, wanted it connected with Elliott Bay by the improvement of Weller Street, and for this purpose he applied to the city council. Weller Street at that time did not traverse this tract at all. It merely began at the bay near the centre of the city, that is to say, at South Fifth Street, and, with many ups and downs, wholly unimproved, though open to the public, projected itself eastward until it stopped at the west edge of this 100 acre tract, which was then, and ever since has been, entirely vacant and, in a measure, wild. (41, 42, 70.)

The tract lay east from the bay, considerably higher and about 2600 feet distant (2). Hill's proposal was that the city "grade and extend" (148) Weller Street from the bay to this tract's east boundary, or, in other words, grade it from the bay over the portion of the street already open, and then enter for the first time and cross his tract. Across the tract was a further distance of 2500 feet (3).

This tract of Hill's was at that time unplatted. He had previously, indeed, discussed with the city officials a plat prepared and even acknowledged, but it is clear

that he had deliberately refrained from putting it of public record (69, 99, 102, 112). Meanwhile, his understanding with the officials was that the proposed improvement should be done in a certain way. An easy ascent to the high ground where the tract lay was to be obtained by an ascending bridge or trestle from Fifth to Ninth Streets (88-9, 115).

With this in view, an ordinance, No. 1285 (2, 150), was passed in February, 1890, a contract under it let, and as much as 98,000 feet of lumber put into place on a trestle or elevated roadway, until objections were encountered from property owners between Fifth and Ninth Streets. Hill, for his part, insisted on the project being carried out as it had been agreed on, but about this time he died (88, 89, 149). Then the city abandoned the plan and tore down the elevated roadway. In place of the elevated roadway it laid at the western end of Weller Street, that is to say, at the bay end, *outside of and farthest from Hill's property*, a plank roadway surface for more than 1500 feet (4), the distance from the bay up the slope to about Ninth Street. The street was then graded (but not planked) further east, entered the tract in question, and crossed it until it terminated on its eastern boundary in a ravine (71, 76, 93). Moreover, we must notice that the very ordinance 1285 authorizing the work had ordered "grade" and "sidewalk," but no *planking* (2, 132). In the tract itself there was no habitation, but on the western 1542 feet of the street where the planking had been laid, in other words, on the end next the bay, residences abounded on both sides and property was of much greater value. The whole distance from the bay to Hill's property was about 2600 feet, and consequently the planking terminated about 1000 feet from his tract.

Previous to this improvement being made under ordi-

nance 1285 there was no roadway at all across the 100 acre tract (70). The 66 foot strip across the tract was at that time pasture land in grass and bushes, no different in appearance from the rest of the 100 acre tract. In 1890, under these proceedings, the city entered upon this 66 foot strip, grading it, making heavy cuts in the hills and building wooden sidewalks. Since the improvement was made in 1890, the 66 foot strip across the tract has not been used as a street, either by foot passengers or by teams. The testimony is as follows (70):

"After the improvement was made, for a great number of years it (the 66 foot strip across the 100 acre tract) has been growing up in brush, the sidewalks rotting, the street itself full of holes where sand was taken out and where streams of water ran." Again (76): "The sidewalks there are all old, showing that they are untrodden, and in places they are broken down, the planks (of the sidewalk) are broken off and they are rotten. There are several places where they are absolutely and utterly gone, practically gone; you have to step over them. They were not used to any extent. There are no houses along there and no wagon tracks."

The ordinance for the work as originally planned was passed, we have said, in February, 1890. Hill died in August of that year, and the altered plan under a modified arrangement with the contractor was made in September (4). In March, 1891, the city ordered an assessment (7) to provide for the entire cost of the work, including *planking*, grading, grubbing, and the laying of sidewalks, the effect of which was to lay upon the one hundred acre tract thirty-two per cent of the whole sum to be raised.

Now, this assessment was annulled by the local courts (8, 41) and it was not until later in 1893 (Washington Session Laws 1893, p. 226) that the State Legislature

passed an act authorizing reassessment proceedings (9, 42—VI, 43—XIV); so that until that time no authority whatever existed for reassessment, nor was any reassessment attempted. Yet it was in this interval that new rights intervened. In January, 1892, the tract was purchased by Snipes, and a mortgage simultaneously given by him to Thompson (8). In March following Snipes filed a plat calling the property the "Hill Tract Addition," but in this the mortgagee, absent and a non-resident (65), did not join (9, 64). Here we must recall the plat prepared by Hill in his life time. We must remember that this had never been put of public record, a fact important because it is urged against us here that since the plat, as he had prepared it, contained Weller Street produced into the tract according to the design of the original improvement, Thompson ought to be bound by it. Not only, though, had it not been recorded, but there is no testimony that Thompson had ever heard of it, while he himself swears that it was unknown to him (64). Moreover, at the date of his loan, the land was so assessed by the city for general taxation that the streets of the Hill plat were disregarded and taxed as private property (72). The reason why Hill did not file the plat for public record was that if he did, the streets would become dedicated and the land would be assessed by lots and blocks (99). The city did not regard the streets dedicated, for it continued for several years to tax as private lands this street strip, thus showing conclusively that they did not deem the strip of land a public street (72). In taking his mortgage, Thompson did so by metes and bounds (9).

A law having been passed in 1893 to permit reassessments, the city proceeded to reassess in January, 1894, (10). In doing so it made such changes from the first assessment as raised the proportion due from this tract to

forty-four per cent of the whole (12), notwithstanding that under the first it had been only thirty-two per cent. All the original cost including the planking was reassessed against the abutting property. This is admitted by the pleadings (paragraphs VIII and XVI of complaint, 7, 11, 41, 44, 68, 156). As we have already stated, there was no habitation in the Hill tract, while there were residences on both sides of the street on the planked end, which end had received for 1542 feet the sole benefit of the planking. Now, the first assessment was levied while the city was under a charter dated 1886, the latter under what is called the "Freeholders' Charter" (10). Under the former (4), it is impossible not to notice that the "*opening*, graveling, *planking* and improving" of streets is a charge on *general taxation*, and that it is only paving, grading, and sidewalks that by its next section could have been made a lien by the district plan.

It is accordingly quite plain that the only thing done inside the Hill tract that could have been assessed to it specially was the grading and sidewalk work, while both the assessment and the reassessment charged this land for the planking as well. Moreover, the methods of assessment in the two systems was quite distinct. Under the old (5), the amount was to be assessed against the abutting property according to the value of each abutting piece of property, while under the new the front foot rule was adopted, levying the tax on the abutting property to a depth of 120 feet, without regard to benefits as between separate pieces within the district or the varying values of the bordering estates. Under this charter provision, special assessments had to be levied according to the front foot, irrespective of benefits (11).

Thompson had no actual notice (12, 65) of the reassessment made after the taking of his mortgage. The

amount levied against the property was, as already stated, forty-four per cent of the whole, or $14,262.68, to which would now be added 10 years of interest at 10 per cent per annum. He subsequently foreclosed his mortgage and took his deed in October, 1895, from the sheriff.

The present is a bill on his part to prevent the enforcement of the lien and to relieve the land of its cloud by perpetual injunction. The lower court held in favor of these contentions. All allegations of the complaint not specificially denied by the answer were stipulated to be considered as admitted (68). Appellant, without our consent and without notice to us, has omitted from the printed record a large part of the testimony, viz.: Exhibits B, 1, 8, 9, 11, 12, 16, 17, 21, 26. This omission makes it difficult to prepare our brief, and we do not see how this court can properly consider this case with these omissions from the printed record.

ARGUMENT.

Our subject seems to divide itself into two heads:

1. Could Hill himself, if still the owner, oppose this reassessment?

2. Even if Hill could not, may Thompson?

I.

Could Hill himself, if still the owner, oppose this reassessment?

It is not necessary to prolong this brief with a discussion which has occupied a good deal of space in the testimony, the discussion whether Hill actually dedicated the street, or whether he so acted as to be estopped from

denying that he dedicated it. The city has appropriated to its own use, without compensation to us, a strip of our land 66 feet wide and 2500 feet long—about 5 acres of land. Of this we do not complain in this case. But the city goes on and attempts to make an assessment against the rest of our property for the cost of appropriating this strip and opening it as a street, and charges up in that assessment the cost of planking the street in another part of the city. The city does this not only when there is no provision of law for such a proceeding, but when the law provides distinctly that the cost of such an improvement cannot be assessed against the abutting property. When any municipal authority so disregards the rights of property, it is taking from the citizen the rights guaranteed him by the 14th amendment to the constitution of the United States.

Even if we concede that the street was dedicated and turned over to the public in the fullest possible manner, it does not follow that the city could multiply charges upon it against the abutting property without regard to existing law or constitutional rights. I may invite a municipality to lay open a street or roadway, I may even dedicate that street or roadway to the public, yet from this it is not a consequence that I have invited them to proceed with improvements in a manner unjust to me or that my mouth is shut against their excesses. On the contrary, it may be fairly presumed that in inviting them to open a highway, I invite them to do so according to the statutes. (*Howell v. Tacoma*, 3 Wash. 715; *Grant v. Bartholomew*, 58 Neb. 839, 80 N. W. 45; *Birdseye v. Clyde*, 61 Ohio St. 27, 55 N. E. 169; *Smith v. Minto*, 30 Oregon 351, 48 Pac. 166; *City of Terre Haute v. Mack*, 139 Ind. 99, 38 N. E. 471).

It was contended, though not seriously, in argument

before the lower court, that it would be inequitable to permit Hill to petition the city to make these improvements and then to refuse to pay for them. When a man's land is assessed unlawfully or in an unconstitutional manner for street improvements, he may contest the validity of the assessment, although he was a petitioner for the improvement. Hill did not petition the city to lay sidewalks through his tract. He did not petition the city to plank the street through his tract or any other part of the street. You must bear in mind that there are two petitions (106, 148). In the petition Hill signed he was careful to say that his property did not abut on Weller Street, but on its extension. He merely petitioned that Weller Sreet be graded and extended through his tract. The other petition requested that the whole street up to his tract should be "opened, graded and sidewalked." Neither petition asked that the street or any part of it be planked. When the proceedings for the original improvement were first contemplated, it was not the intention to plank any part of the street. A contract had been let by the city by which certain bridges were to be built. Just previous to the death of Mr. Hill, in August, 1890, he heard that the city was about to change the plans of the street, by which the bridges were to be taken away and the street planked for the distance of about 1500 feet. When he heard of this proposed change by which the planking was to be put in, Mr. Hill protested against such change being made in the plans (103, 106). About two months after Hill's death the plans were changed by the city, and by this change of plans the street was planked for the distance of 1500 feet (96). The Supreme Court of the State of Washington decided (*Howell v. City of Tacoma,* 3 Wash, 715) that where a municipality acts unlawfully and without authority in making an assessment by the front foot, because some of the lands extended

back several hundred feet while others extended only one half of the distance back from the street, the petitioner for the improvement is not estopped from contesting the validity of the assessment.

See also *Birdseye v. Clyde*, 55 Northeastern (Ohio St.) 169, supra, where it was held that there is no estoppel against a petitioner for the improvement as against illegal assessment. The court in that case said that the petitioner had a right to suppose that the work would be done in conformity with law and not in violation of provisions of law.

So in this case, assuming that Hill threw the street open and invited an improvement too, what was the state of law under which he had a right to expect this work to be accomplished? The city was then under the old charter (4). (For a full copy of this charter see Session Laws Washington Territory, p. 238.) Under this (Section 7), the "clearing, opening, graveling, *planking*, and improving" of streets is a charge on general taxation. By the same charter (Section 8), "paving, grading and sidewalks" could be made a lien by the district plan upon abutting property. Of course, if "planking" in Section 7 is absorbed by "paving" in Section 8 of the charter, it might be said that planking could be made a charge upon the abutting property too; but, as is said by the Circuit Court (131-2), the latter does not include the former. Planking is not paving, but is a makeshift until paving can be accomplished.

We feel safe, therefore, in saying that planking was left by the charter of that period as a charge only on general taxation; that the cost of planking here, even if extended into the tract, could not have been charged against the abutting property, and that, as the planking never was made within a thousand feet of the tract but stopped 1500 feet from the bay, the planking could neither

in law nor in morals be made a charge upon nor deemed to be a benefit to this estate. But this is not all. The very ordinance (1285) that authorized the work gave authority for no such thing as planking, only for grading and sidewalking (53, 132).

Upon these facts themselves, it seems plain to us that Hill was in a position to defeat an assessment charging his property with the planking. But there is more. We must remember that the city, after beginning upon the plan as originally proposed, by which an elevated roadway should make an easy grade to Hill's tract, and after wasting some 98,000 feet of lumber in this project, abandoned it. It was abandoned and never resorted to again. Then the matter got into the courts, and the entire assessment under the old charter was defeated. Supposing Hill to have continued to live, he would now be confronted with a reassessment under the new charter. This reassessment would charge back to him the planking which never came within a thousand feet of his land, and had not even been authorized by ordinance.

To us, then, it seems clear that, judged even by statutory law alone, the original assessment was grossly wrong under the old charter and ordinance 1285. If this was so, the reassessment under the new charter and new ordinance was equally bad, because it obstinately adhered to the same ingredients of lien as the original, "the whole cost" being reassessed (11, 44). In other words the plainly improper planking became again a charge with this additional injustice, that the proportion charged against this tract was raised from 32 to 44 per cent of the whole cost (12, 44-5). As to reassessments, we concede that much irregularity and want of authority may be cured by them, through either contemporaneous or subsequent enactment, but as their retroactive effect is always justi-

fied by courts on the theory that the property has previously had the benefits, we deny the propriety or justice of reassessment here, when the subsequent planking never went into this estate or near it.

Nor can it be said that Thompson should have taken steps earlier to protect his rights. He never knew or heard of this reassessment against his property made in 1894 until several years after the reassessment was made. (65). Moreover, at the time he took his mortgage in 1892, nothing on the public records showed that the city claimed this strip of land as a street. On the contrary, the city was then taxing the 66 foot strip as private property, thereby announcing to the public that they did not claim the strip as a street. Moreover there was then no valid assessment of record against the property. It had previously been declared void by the courts (8). There was at that time no law in force authorizing the city to reassess for any assessment theretofore declared void. Relying upon the public records, Thompson invested $164,000 in the property, taking as his security this 100 acre tract, and taking as a part of this security this 66 foot strip, which the city at that time was treating as private property by taxing it as such.

When Thompson learned after the lapse of several years of this illegal and unconstiutional assessment against his land, he might have waited until suit was brought by the city to foreclose this assessment. But he did not wait. He availed himself of his constitutional rights by applying in this suit to the courts to prevent the city from commencing any such foreclosure suit, or from enforcing this alleged lien. When a man's land is unlawfully reassessed in an unconstitutional manner for street improvements, he need not take any steps, but may remain in possession of the land until after it is sold by the

city and then raise the question of the illegality or unconstitutionality of the tax in a suit in ejectment by the city or purchaser at the sale. This principle is laid down and ably discussed by Justice Ross (now U. S. Circuit Judge in the 9th Circuit) in *Mulligan v. Smith,* 59 Cal. 233. See also *Parker v. City of Detroit,* 103 Fed. Reporter 357, where no affirmative action was taken by the owner, but who raised the question after sale in a suit in ejectment based on the street assessment. See also *Howell v. City of Tacoma,* 3 Wash. 715, where the Supreme Court of Washington decided that though a man petitioned for the making of street improvements, yet he might contest their validity when made in an unlawful manner or without authority. The defect in those proceedings was that the assessment was made by the front foot when some of the lots extended back several hundred feet but others extended only half that distance from the street. In passing upon this question, the court in that case said:

"It (estoppel against the petitioner for the improvement could not be extended so as to estop one from asserting rights against such assessment when the common council had never had any jurisdiction of the proceedings *or had so far departed* from proper methods as to oust it of jurisdiction. In the case at bar we think that the proceedings clearly show such a departure from constitutional methods as to render them void, and for that reason respondent as a petitioner for the work is not responsible therefor or bound thereby."

See also *City of Terre Haute v. Meek,* Ind. 38 N. E. 471.

Nor is this a case in which it can be said that a certain part of the tax at least is due, but that, omitting the planking charge, we ought to pay or tender the rest. There is no separate charge apparent for the planking. It is impossible to say what is due without it. What the

cost of the planking is does not appear. But as is said by the trial court (132), it must be presumed that the cost of planking a strip 66 feet wide and 1542 feet deep is a considerable part of the whole cost. The rule of partial tender in resisting taxation is just, as well as practicable, where items are apparent, as where I am taxed on so many horses and so much household furniture, yet claim myself not liable on the former. But in a case like this we see no data for segregation, whether the whole tax (as in *Norwood v. Baker*) be regarded as wrongful, or whether one ingredient of it be clearly in violation of a charter or unsupported by an ordinance. (*Howell v. Tacoma*, 3 Wash. 711, *Norwood v. Baker*, 172 U. S. 269). This is not a case where it is conceded, either, that a part of the property is justly charged, as where I have several lots of which some receive the new improvements while others do not.

To resume, Hill's land was taxed by both the original and the second assessment for planking. This planking could not by the charter be made a special lien, nor was it ordered by the ordinance to be done, even if the charter had permitted it. Thus it violated statutory law. Then constitutionl law was violated also, for, supposing planking to be capable of being made a specific lien, we contend that to let that planking end 1000 feet from us and yet place us in a district with it, to bear the charge in comon with the residence quarter that alone received it, it is a gross and wilful inequality not necessary to be condoned by a court in order to support by precedents the useful policy of district improvements.

To see how great this inequality was, let us consider a moment. There are two degrees in which this property might have been made, theoretically at least, to receive *quid pro quo*. The planking might have been

brought to the edge of the tract, or it might have been brought not only to the edge but all the way through it too. Actually, either or both these might be of smaller benefit to it than the cost, but in theory the property holder would have cause to complain. By the former the tract would have been brought 1000 feet nearer in a practical sense to the main traffic, or so much more accessible in a region notorious for mud and rain. Remember, *the street itself had long previously been opened as far as the tract* (2), hence it cannot be said that, though the planking was not extended to it, the highway, at all events was. Thus he got nothing by the former of the two theoretical benefits. The other theoretical benefit would have occurred if the planking had not only reached the tract, but had gone all the way through it. The property, let it be borne in mind, was itself 2500 feet across (3). It was, in other words, almost as wide as the whole distance between its western edge and the bay, hence one half the whole street improvement district. But while it was thus one half of the district, it is preposterous to say that there was contributed either within it or reasonably near to it, any part of the principal improvement. Nevertheless a charge of forty-four per cent., or almost half, was placed upon this vacant tract and no more upon the residence portion outside, which received the principal benefit and was best able to respond.

What was the use of this? What friend of the district assessment plan can fairly say that this is a just application of it, or that if the court should annul this one, harm would be done to the principle in general? The writer of this brief has always favored this kind of taxation. I am unable to see, though, why two districts could not have been created here—one the planked district, the other the graded one. (See *Spencer vs. Mer-*

chant, 100 N. Y. 585.) This whole Weller Street proceeding discloses downright carelessness in the city officials. Nothing is plainer than by virtue of it the property on the west and settled end got a planked street by charging half the expense to a vacant tract of which the nearest portion was 1000 feet distant and the average of which was 2200 feet away.

This brings us to the celebrated case of *Norwood v. Baker,* about which there has been an extraordinary diversity of opinion. To part of the profession this was a very proper blow at the system of district improvements by the front foot, to the rest, a grossly erroneous decision, clearly overridden by later ones. To the writer of this brief, both these views seem to be wrong.

To us, *Norwood v. Baker,* seems to apply to this kind of taxation what before was admitted as to all taxation, that is to say, that when a tax reaches a point where it violates the principles of taxation itself, it ceases to be a tax and is mere confiscation. Let us conceive an instance under general taxation. That a government is the ordinary judge of the amount of a tax, and that general taxation constitutes a levy for the common support of government, is conceded to begin with, but suppose that in a time of profound peace and of economic surplus a government levies a tax of 100 per cent. of all values. This, it seems to us, would be confiscation, and would be arrested by a court. Or, since it is the law that taxation must be for purposes that are public, suppose a legislature levies taxation for the purpose of aiding some avowedly private enterprise. This would be no taxation, but mere confiscation, a taking their property from one set of citizens to give it to another. Now, these well established doctrines may find their illustration in the district plan. That a considerable latitude

ought to be given to those who arrange these districts is plain. Absolute equality is out of the question. But there may come a time (as we think occurred in *Norwood v. Baker*) when the inequality is so gross and apparent that the thing ceases to be district taxation at all. Then it can be arrested by a court on the ground, not that every district plan is bad, but that this one was.

In our own case, leaving out the violation of plain statutes involved here, we think there is such inequality as amounts to confiscation. Upon this point it is unnecessary to prolong our argument. The facts are before the court, and each case must of course stand upon its own statement. We saw that it was grossly unnecessary and unjust to include this vacant, unoccupied tract in a district which was to bear the expense of planking when that planking was extended only along the settled portion of the street, and was to stop a thousand feet from our own tract, vacant and wild.

This was not one of the decisions made in blind belief that *Norwood v. Baker* had annulled entirely the front foot plan. It was, on the contrary, rendered in June, 1901 after later decisions had corrected that misapprehension. Those later decisions distinguishing *Norwood v. Baker* and now reported in 181 U. S. were all read to the trial court in the final hearing. The opinion of Judge Hanford shows that he clearly understood the limitations while he applied the doctrines of *Norwood v. Baker*. The gross, unnecessary inequality of this district struck him so forcibly that he would have reached the same conclusion had the *Norwood* case never been decided, as did the Supreme Judicial Court of Massachusetts (*Sears v. Boston*, 173 Mass. 71,) where they remarked that the conclusions of the Norwood case were no more than what their own decisions had previously made clear. (See cases cited 2 Cooley Tax. 1209).

II.

Even if Hill could not avoid this reassessment, may Thompson?

It is apparent that Thompson has not only all the defenses that would have belonged to Hill, but others peculiar to himself.

The following things were clear at the time when Thompson took this mortgage upon this land. First, there was no existing assessment against it (8). Second, there was no law by which reassessment could be made (9). Third, for the purposes of general taxation, the city had ignored the street and up to the time of the taking of the mortgage taxed it as private property in bulk with the rest of the land (72). Fourth, the plat by which any street was or could have been dedicated to the public had never been put on record, and Thompson knew nothing of it (64). Fifth, Thompson took his mortgage by metes and bounds, and not by plat (8, 9). The most, therefore, that can be argued against Thompson is that he took his mortgage upon a piece of property which had a street cut into it, and that he may be presumed to have seen this street with his own eyes. But this street, even if he knew of its existence, might have been opened at private expense, or (if opened at public expense at all) out of the general funds of the municipality under the charter of that period (4, 5).

We have thus, we think, the case of a reassessment by *subsequent law* against an innocent purchaser.

We concede the following to be the law. Reassessments may be made to cure grave irregularities and defects of prior assessments. These reassessments may be made against two classes of persons, either against the original owner or against a subsequent purchaser for

value. Against the original owner reassessments may be made by virtue either of statutes existing when the original is made, and providing beforehand that all irregular or defective assessments may be reassessed, or by virtue of a law not then existing but called into existence for the express purpose of a cure. As to him, in other words, there is no ground for complaint that the method of curing the defects is by subsequent law. As to a new purchaser, also, reassessments can certainly be made if, at the time he purchases, there is in existence a law providing for reassessments. It matters not that at the time of his purchase the original assessment may have been plainly bad, or by some court declared to be bad, if, nevertheless, there then existed a statute which would allow the reimposition of the lien.

It is, however, when two things concur that district reassessment must fail. If there has been a transfer of title, and if, besides, the law to reimpose the assessment was not made until after the transfer, then the reassessment comes too late, and other doctrines much favored by our law rise superior to it.

The Supreme Court of the State of Michigan has laid down a rule of property—in refusing to recognize a vendor's lien—that no secret lien should be sustained in the state. Richards v. Shingle Co. (Mich.) 41 N. W. 860. (See Smith v. Allen, 18 Washington, 1, where the court says: "The policy of our registration system is against such liens. Here land is essentially a subject of trade and commerce, and purchasers and incumbrancers look to the record for their information."

Morever, nothing is more odious in American eyes than an attempt to disturb vested rights. While, therefore, much indulgence has been shown to curative statutes, and while, as between the original parties, consider-

able scope has been given to them, we think they have never been permitted to interfere with the rights of third persons whose investment has meantime been made in good faith. The learned Cooley, in discussing curative statutes, says:

"A subsequent *bona fide* purchaser cannot be deprived of property which he has acquired by an act which retrospectively deprives his grantor of the title which he held when the purchase was made. Conceding that the invalid deed may be made good as between the parties, yet if, while it remained invalid and the grantor still retained the legal title to the land, a third person has purchased and received a conveyance, with no notice of any fact which should preclude his acquiring an equitable as well as a legal title thereby, it would not be in the power of the legislature to so confirm the original deed as to divest him of the title he has acquired. The position of the case is altogether changed by this purchase. The legal title is no longer separated from equities, but in the hands of the second purchaser is united with an equity quite as strong as that which exists in favor of him who purchased first. Under such circumstances, even the courts of equity must recognize the right of second purchaser as best and as entitled to the usual protection which the law accords to vested interests." Cooley Constitutional Limitations, 3d Ed., —. 539-40. This opinion he fully sustains by numerous cases in his notes.

The foregoing was not uttered under assessment doctrines, but we think the same reason should apply. Nor do we think this court has ever let fall what would give rise to any other opinion. In sustaining the right of reassessment in *Williams v. Board of Supervisors,* 122 U. S. 154, you were careful to add of defective proceedings: "Their omission or defective performance may be cured by the same authority which directed them, *provided, always, that intervening rights are not impaired.*"

Accordingly, in examining cases that sustain reassessments, two things must always be borne in mind. First,

are they reassessments against only the original owner? Secondly, if they are cases in which the property has changed hands, yet at the time of purchase, was there already existing a law for reassessment? We do not believe there will be found a case—certainly we do not think there will be found one that would appeal to the mind of this court—in which, not only has the property changed hands, but the law which seeks to reimpose the burden was not called into existence until afterwards. We have found one or two under *general* taxation (*Tallman v. Janesville*, 17 Wis., 51; *Cross v. Milwaukee*, 19 Wis., 509), but non were district assessments, to which we shall apply what seems a plain distinction.

What hardship can result to the state from the principle which we invoke? Looking at the thing from a practical standpoint, almost none. In nearly every state in the Union there now exists a law providing for reassessments. No transfer of interests, therefore, will, according to our reasonable contention, avoid in future any burdens which the states may seek to reimpose. It would be better to sustain the rights of an innocent purchaser like Thompson, than to give any encouragement to doctrines that, in other fields of inquiry, might impair the obligation of a contract, might deprive one of property without due process of law, might deny him the law of the land. These considerations appear to us not to be sentimental, but, on the contrary, to be reasonable, only bare justice to Thompson. The city now seeks to reimpose a very considerable tax, of which there was not only no notice to Thompson, but which had been declared invalid by the courts. Nay, more. The advice of his counsel at that time must have been, if indeed there was anything to suggest liability, that not only was this lien dead, but that it could not be revived, that is to say,

that there was no law in existence by which it could be recreated.

It seems to us an opposite argument is opposed to public policy. If the state can reimpose a tax by subsequent legislation against new purchasers, what time or limit shall be set to its action? Where there is already a law, the owner of the property, in seeking to dispose of it, may make calculations with his vendee, and sums may be reserved or set aside in some fashion or other to provide against the contingency. The reserved power of reassessment, even under statutes already existing, is no small hamper to the transfer of property and tends to impede sales, but when we go farther, and say that even after these transfers new statutes may be passed, what arrangement can possibly be made by the vendor and vendee? There is no law existing at the time by which the vitiated assessment can be recreated, so it is doubtful whether, in the contentions of legislatures, any such law ever will be passed, but worst of all if it can be passed at all, there is no telling how many years the legislature may suffer to lapse before they will pass it. Against their right to pass it, if they have the right at all, there is, it is plain, no statute of limitations. Pre-existing laws for reassessment, on the other hand, will naturally impose upon themselves a period. There is a time within which vendor and vendee know that action must be taken, and against this the devices of contract, though burdened and annoyed, may probably provide. Against subsequent enactments, however, ingenuity is of no avail, because no one knows whether they ever will be passed at all, or within how many years.

The lien here resisted was a secret one. This seems to us not true of liens reassessed under laws existing before the new purchaser comes in. There he buys with

the knowledge that the state has already asserted the right, though it has not yet exercised the intention. As against subsequent laws, the purchaser may well protest that at the time he bought, the state had not even asserted a right. The state should be estopped, as it was in a certain case where its officers had erroneously discharged a tax of record on the faith of which a transfer was made. *Curnen v. New York*, 79 N. Y. 511.

We do think that in the present instance a difference of $15,000, which represents what was then approximately this tax, might have made a great difference between these parties, and that the burden of it now must presumably fall upon the vendee, Thompson, and his heirs alone, if he is to be bound by a statute passed since his investment. In speaking of his investment we of course refer to the date of his mortgage, and presume it is not necessary to cite to this court that his subsequent acquisition of the fee will relate to that time.

We have said that in considering this case the court ought to protect the innocent purchaser, rather than lay any precedent which in parallel fields of reasoning might endanger the sacred doctrines of vested rights. It may, on the other hand, be suggested that the court is likewise under duty to decide here nothing that would impair the equally salutary principles of taxation. To this we accede. We think, however, the case can be decided in favor of the innocent purchaser, without any danger whatever to the sovereign right of taxation. Let us see. That the system of district improvements is a branch of the law of taxation, we at once admit, to begin with. District assessments are a tax, but while they are a tax, it is perfectly clear that they are not a tax in the sense in which the tax is generally understood. Cooley calls them "a peculiar species of taxation, standing aprt from the

general burdens imposed for state and municipal purposes, and governed by the principles that do not apply universally." (Taxation, 3d Ed., Chap. XX, p. 1153). The many learned authorities which he cites may be glanced at with some benefit, as showing how universal is the opinion that this system of levies, while classified under taxation, is viewed differently by the courts in its collision with the rights of individuals. Our liability to general taxation attaches to us at birth, may in times of necessity involve even our bodies, and cannot be shaken off by anything less than death or exile. It promises no specific return for the burdens imposed, and notice, though commonly given, cannot be required of its exactions. How different in the case of district assessment. It cannot be levied, and no state has ever tried to levy it, without some form of notice, particular or general, private or published. (*Scott v. Toledo*, 36 Fed. 385; *Paulsen v. Portland*, 149 U. S. 30). Far from being able to depend upon vague or general return through the public good, it depends for its very existence upon a specific benefit bestowed. It is even less an attribute of sovereignty than the power of eminent domain, which arbitrarily determines to take from a man his property without any benefit whatever in return except the compensation which a court may adjudge.

It must be perfectly apparent that while we may, for convenience, call the district assessment plan taxation, it is to be judged by principles wholly different. It must, theoretically at least, propose to the property taxed a benefit fairly demonstrable. It must, in the second place, originate in some form of notice. Now, that which depends upon notice for its creation may well depend upon notice for its existence also. What harm is done to the district assessment plan, as a general scheme of public good, and as even a branch of the law of taxation, if,

since it must be founded upon a notice, we should contend that anything which once cleared the title, so that an investor could fairly be said to purchase without notice, would relieve the estate of the lien? Were such a decision to be made in this case of district assessments, we do not see how it could, with any plausibility, be made harmful to general taxation. Certainly it would be far better to impose this fair restraint upon this system of things, than to say that when a person invests his money under the circumstances in which Thompson did, a secret lien can, by subsequent statute, be brought to light and reimposed, where the lien had already been annulled by the courts, where no statute existed for its recreation, where the property had recieved, as the trial court says (133), "little or no benefit," where there was no warrant in ordinance at all for a portion of the work, and where the state, or its agent, the city, had already misled the purchaser by assessing for general taxation as vacant acreage that which it afterwards claims is an adopted street and subject to liens for improvement.

We respectfully submit that the judgment of the lower court should be affirmed.

FREDERICK BAUSMAN,
DANIEL KELLEHER,
G. MEADE EMORY,
Solicitors for Appellee.

IN THE

Supreme Court of the United States

CITY OF SEATTLE, *Appellant*,

vs.

DANIEL KELLEHER, as Administrator of JOHN W. THOMPSON, deceased, *Appellee*.

PETITION FOR REHEARING OR FOR MODIFICATION.

Appellee respectfully moves the court for an order granting a rehearing or for a modification of the judgment, on the ground that the opinion requires only reversal of the decree while the judgment as entered requires dismissal of the bill. The Appellee on the following showing believes that the ends of justice will appear to your Honors to be more fully subserved by allowing further proceedings below.

FREDERICK BAUSMAN,
Counsel for Appellee.

PETITION FOR REHEARING OR FOR MODIFICATION.

By the charter of Seattle in force when the original work was petitioned for (1889) and the ordinance (February, 1890) provided for it, it was provided that if upon any suit by the city to enforce its lien, there should appear defects, informalities, or irregularities prejudicial to the objecting party, the court might disallow the city its costs, while, "if the proceedings appeared to have been *regular*," the city might add ten per cent. per annum from the date of the delinquency, with five per cent. additional as a penalty. (Rec. p. 6). Under this our state supreme court forbade interest and penalty in a case in this very district where the proceedings did not appear regular. *Seattle vs. Hill*, 23 Washington 92. The spirit of the regulation was this. There would be cases in which the question whether the assessment was legal might be a very close one, on account of irregularities so grave as sometimes to amount to invalidity and in others to come very near it, so that it would often happen that the party who contested the assessment, and thus got himself into delinquency, was not unreasonable. Such persons, the charter intended, should not be mulcted for making a defense where defense was natural.

So reasonable a regulation was, however, insufficient for the temper of a city which, if the present be a fair illustration, was not disposed to create districts in the nicest justice to those who composed them. Accordingly, the new charter under which, by statute of 1893, the reassessment was made in this case, determined to put such as might, like ourselves, question the fairness of a district, in a position to fare hard for arguing about it. It re-

solved to make a hearing expensive. This new charter struck out the conditional feature of the ten per cent. interest and five per cent. penalty, and made it mandatory.*

The result of it all is that the objector in the present instance now stands confronted with ten per cent. interest for ten years and five per cent. penalty upon the original amount, all this for refusing to pay his share of a tax which the judge of the lower court, familiar with the situation, pronounced to be more or less an outrage, which two justices of the supreme court of the country dissent from enforcing, and which the writer of the present opinion concedes to be *prima facie* "an unwarrantable attempt to make one man pay for another man's convenience." In other words, where no fair-minded man can doubt we were justified in calling for judicial inquiry, we are obliged to pay more than double for making that inquiry. The assessment of something above $14,000 is now made to exceed $30,000.

It seems to us that this court will be in a humor to permit the objecting Appellee to obtain, by any further proceedings in this cause, whatever relief the lower federal court may yet find in its power. For this reason, we ask your Honors to modify the judgment now entered, which requires a dismissal of our bill.

"* * * and that *unless payment is made within thirty days* from the date of such notice such assessment shall become delinquent and shall *bear interest at the rate of* 10 *per cent. per annum* until paid, *and if not paid before such assessment shall have become delinquent, a penalty of* 5 *per cent. shall* be added, and the sums delinquent shall be entered on the annual tax roll for the current year against each lot and parcel so delinquent, and, with the interest, collected as other taxes, separate account being kept thereof, and if not paid within the time fixed for the payment of city taxes, shall be collected as charges or penalties as are authorized to be charged and collected on other delinquent taxes, and each lot or parcel so delinquent shall be sold for the amount of such assessment, with interest and costs, at the time and in the manner and by the same authority as lands and lots are sold for city taxes."—Charter of Seattle, March 8, 1892.

Your Honors' opinion conceding that the thing looks unjust on its face (or as you more strongly express it, unwarrantable), conceding also that the judge of the lower court regarded it as manifest injustice, and conceding that his opinion being local should carry great weight, still counterbalance all this by presuming that there must be some thing or other in fact to justify it. But, your Honors, this presumption appears to us to be at least unexpected. That a presumption exists in favor of discretion exercised by the board that creates a district, we admit, and it is quite clear that he who attacks must be prepared to make a showing. Supposing such a district to look reasonable on its face, the attacking party, it appears to us, would be making some progress when he introduced proof to show that, though fair on its face, the district was unfair in fact. Having introduced a reasonable degree of proof upon that point, he would shift the burden of proof, we think, to the city to explain. Similarly in our own case, where the thing on its face is unfair, and indeed provokingly unjust unless explained, (when in fact we are made to pay one-half of a planking which terminated a fifth of a mile from the edge of our tract, and nearly half a mile from its average distance), it does seem to us that the city should do the explaining, and show affirmatively whether this thing was just or not. If in this supposition we were wrong, the error was certainly not unreasonable, nor can we be blamed for not anticipating your suggestion that one way in which the city could offset the unreasonableness of the plan would be by showing that more money was expended in one quarter than in another by the distribution of cuts or fills.

Accepting, now, the suggestion of the court, we ask your Honors whether you cannot with justice save us

from the severe penalty of not having anticipated it, in other words, remand this cause, not for dismissal, but for further proceedings upon the point suggested by your Honors. Your opinion merely "reversed" the decree, but the judgment as entered, we find, commands a dismissal of the bill. The heirs of the deceased Thompson are ready to contest. We are ready and feel abundantly strong to show by proof that this inequality, instead of being reduced by actual facts, is in truth much worse, and that the opinion of the trial judge respecting it is more than justified by all the facts when put in evidence.

Nor is it unfair in us to suggest that if any escape be afforded from the subsequent charter and the mandatory interest, the lower court be permitted to accept our tender of the principal if irregularities in the assessment ingredients or proceedings appear, as indeed we think they already appear in the inclusion of a planking that could be charged only against the general funds of the city.

Who is to lose by this delay? Who can say that it will be wrong to give us additional opportunity for proof? It is not the city that can lose by this, or any holder of its warrants. It is only the Thompson heirs. It is not the city, because that vindictive interest of ten per cent. and that penalty of five per cent. remain as an abundant compensation to the town or to the holders of its district warrants. It is only the Thompson heirs who will have to pay in the future, as under your Honors' opinion they may severely have to pay for the past, in this respect. It seems to us that upon such terms as these the court may feel it should give the contestant every possible opportunity to make good his claim. So far as the writer of this petition can recollect, the present is the first instance of a district in which one part received a form of pavement and the other none. Even in *French vs. Bar-*

ber Asphalt Company, where you affirmed the lower court in sustaining a district plan, you quoted the language of the lower court to the effect that the pavement was "uniform in distance and quality throughout the district." Certain it is that instances so harsh as this and so apparently founded in partiality must not be encouraged. When they are found, every possibility of fair defense should be given, especially when, as here, the contestant is required to reimburse the city heavily for his pains.

Your Honors concede that the lower court, which stamped this district as "manifestly" unjust, might have good reasons in his local knowledge for saying so. Is it improbable, then, we shall make him right by proof? In granting us further proceedings below, does the indulgence appear useless on its face?

Respectfully submitted,

FREDERICK BAUSMAN,
Counsel for Appellee.

I, Frederick Bausman, counsel for Appellee, do hereby certify this 15th day of December, 1904, that the foregoing petition is made in good faith, not for delay, and that the same appears to me well founded in law.

FREDERICK BAUSMAN.

Supreme Court of the United States.

No. 29.—October Term, 1904.

The City of Seattle, Appellant, vs. Daniel Kelleher, Administrator of John W. Thompson, Deceased.	Appeal from the Circuit Court of the United States for the District of Washington.

[November 28, 1904.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a decree of the Circuit Court declaring an assessment upon the plaintiff's land void under the Fourteenth Amendment, and enjoining the city against enforcing the same. The facts are these: Weller Street, in Seattle, runs east from Elliott Bay, and formerly stopped at the east line of Maynard's Donation Claim. The land now belonging to the appellee, the plaintiff below, is a hundred acres to the east of that line, extending to the line of the Jackson Street Addition. Weller Street, if extended eastward, would run through the middle of this land for twenty-five hundred feet. While this land belonged to one Hill, in 1889, he petitioned that Weller Street be extended and graded to the Jackson Street Addition line, and he submitted to the City Council and circulated, although he did not record, plans showing the extension, with his land on the two sides of it divided into lots and blocks. The plan was approved, and in 1890 the city passed an ordinance that Weller Street be graded from the beginning to Jackson Street Addition, and that sidewalks be constructed on both sides of it coextensive with the grade. Ordinance No. 1285. The street was graded, and, according to the testimony, had to be cut and filled almost continuously. It also was planked for some distance, but the planking stopped about a thousand feet before reaching Hill's tract. Then an assessment was levied, but this was held void. The next things that happened were a sale of Hill's land and a mortgage of it in January, 1892, to the appellee, which later was foreclosed. The appellee, who lived out of the State, alleges that he was ignorant of the submission of the plan by Hill.

On March 9, 1893, an act was approved authorizing a new assessment, when the old one had been declared void, upon the lands benefited, to the extent of their proportionate part of the expense of the improvement, based upon its actual value at the time of its completion, and having reference to the benefits received. Notice by publication of a time for hearing objections was provided for, with an appeal to the courts. Laws of 1893, c. 95. When the improvement in question was ordered, by the charter of Seattle the

planking was to be paid for out of the general taxes. Laws of 1885–1886, pp. 238, 241, § 7. The special assessment for the other elements, according to the assessed value of the land, could be imposed upon the abutting property to one hundred and twenty-eight feet back from the street. This was modified by a new charter adopted later in 1890, and still in force. Under the latter the assessment was to be by the front foot, with different percentages for four parallel subdivisions at successive distances from the street up to one hundred and twenty feet. It was to be for the cost of the improvement. To carry out the plan, local improvement districts were to be established, including all the property within the termini of the improvement, and not more than one hundred and twenty feet on each side of the margin. Reassessments were authorized. In pursuance of the charter an ordinance was adopted by the city providing the manner in which the local assessments should be made. Ordinance No. 2085.

In this state of the ordinances and laws a reassessment of the whole cost of the improvement was ordered in January, 1894, in conformity with the act of 1893, the new charter and the Ordinance No. 2085. Ordinance No. 3199. The proper steps were taken and the assessment was confirmed on March 5, 1894. Ordinance No. 3267. By this assessment the whole cost of the improvement, $35,620.60, was levied on the abutting land, and $14,262.68 was fixed as the plaintiff's share. It is alleged that he thus is charged forty-four per cent under the present plan, whereas under the one in force when the improvement was made he would have been charged only thirty-two per cent. It also is alleged that, being absent from the State, he did not know of the reassessment proceedings until they were concluded.

The bill disputed, among other things, that the prolongation of Weller Street through the plaintiff's land, ever had been dedicated as a street. But in view of the assumption by the Circuit Court that the dedication was made out and the statement by it that the point had been decided by the Supreme Court of the State, this objection, if open, very properly was not pressed before us. See *Seattle* v. *Hill*, 23 Wash. 92. Therefore we have not gone into details upon that part of the case. We see no cause to doubt that the Circuit Court was right. The main ground of argument is that the planking could not be included in the assessment. The reasons, as summed up by the Circuit Court, are that the law in force at the time of doing the work did not authorize a charge for planking upon the abutting property, that the Ordinance No. 1285 ordering the improvement did not authorize any planking, that the city could assess only the land abutting on the improvement and the plaintiff's land was far away from the planking, and that such an assessment of the whole cost, including the planking, on the property on Weller Street, is absolutely unfair as to the plaintiff's land.

A general attack upon the statute of 1893 is not attempted. It was within the power of the legislature to create, or to authorize the creation, of special taxing districts, and to charge the cost of a local improvement upon the property in such a district by frontage. *Webster* v. *Fargo*, 181 U. S. 394. *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324. *McNamee* v. *Tacoma*, 24 Wash. 591, 595. Cooley, Const. Lim., 7th ed., 729. The only question of principle, therefore, raised by the inclusion of the planking in the sum of which the plaintiff was to pay his share is whether it was manifestly unfair in this particular case. Taken by itself it looks like an unwarrantable attempt to make one man pay for another man's convenience.

On the other hand, so far as the work was similar in character, throughout the street, we are of opinion that the improvement might be regarded as one. *Webster* v. *Fargo*, 181 U. S. 394. See *Lincoln* v. *Street Commissioners*, 176 Mass. 210, 212. And if this be admitted we cannot say that the assessing board might not have been warranted in thinking that substantial justice was done. There were many cuts and fills made in grading the road. So far as appears, the heaviest work may have been done on the plaintiff's land, which seems to have been the summit of an ascent. Improvement of one sort may have been the greatest there, while that of a different kind, needed where the travel was, was at the other end of the street. It is true that the Circuit Judge considered that there was manifest injustice in assessing the plaintiff's land, which was empty and unimproved, by the front foot at the same rate as the improved land lower down and nearer to the bay, and that his opinion naturally carries weight, from his probable acquaintance with the condition of the place. But we do not find a sufficient warrant for it on the record. We must consider how things looked at the time. The owner of the land desired the improvements, if carried out as he wished. The extension of the street helped to bring his land into the market. It was more likely to benefit him than those who were lower down. We cannot invalidate the assessment because the speculation has failed. Assuming, without deciding, that the question is open to the plaintiff in this proceeding, we are of opinion that the record does not justify interference by injunction on the ground that the assessment was manifestly unfair.

The answer to the other objections may be made in few words. If, as is said, planking was not authorized under the word "sidewalks" in Ordinance No. 1285, the city has done or adopted the work and presumably has paid for it. At the end the benefit was there, on the ground, at the city's expense. The principles of taxation are not those of contract. A special assessment may be levied upon an executed consideration, that is to say, for a public work already done. *Bellows* v. *Weeks*, 41 Vt. 590, 599, 600. *Mills* v. *Charleton*, 29 Wis. 400, 413. *Hall* v. *Street Commissioners*, 177 Mass. 434, 439. If this were not so it might be hard to justify reassessments.

See *Norwood* v. *Baker*, 172 U. S. 269, 293. *Williams* v. *Board of Supervisors*, 122 U. S. 154. *Frederick* v. *Seattle*, 13 Wash. 428. *Cline* v. *Seattle*, 13 Wash. 444. *Bacon* v. *Seattle*, 15 Wash. 701. Cooley, Taxation, 3d ed., 1280. The same answer is sufficient if it be true that when the work was done the cost of planking could not be included in the special assessment, which again depends on the meaning of the words "sidewalk" and "pave" in the old Charter, § 8, taken with the special provision for planking in § 7. Laws of 1885–1886, pp. 238, 241. The charge of planking on the general taxes was not a contract with the land owners, and no more prevented a special assessment being authorized for it later than silence of the laws at the same time as to how it should be paid for would have. In either case the legislature could do as it thought best. Of course, it does not matter that this is called a reassessment. A reassessment may be a new assessment. Whatever the legislature could authorize if it were ordering an assessment for the first time it equally could authorize, notwithstanding a previous invalid attempt to assess. The previous attempt left the city free "to take such steps as were within its power to take, either under existing statutes, or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property" in any constitutional way. *Norwood* v. *Baker*, 172 U. S. 269, 293. *McNamee* v. *Tacoma*, 24 Wash. 591. *Annie Wright Seminary* v. *Tacoma*, 23 Wash. 109.

We think it unnecessary to consider other questions on the part of the case that we have dealt with. We have said enough in our opinion to show that the enforcement of the assessment lien could not be prevented by the original owner. It is urged, however, that a different rule could be applied in favor of one who purchased the land under the circumstances stated above. But the attempt to liken taxation, whether general or special, to the enforcement of a vendor's lien, and thus to introduce the the doctrine concerning *bona fide* purchasers for value, rests on a fallacy similar to that which we have mentioned above, which would deny the right to tax upon an executed consideration. A man cannot get rid of his liability to a tax by buying without notice. See *Tallman* v. *Janesville*, 17 Wis. 71, 76. Cooley, Taxation, 3d ed., 527, 528. Indeed he cannot buy without notice, since the liability is one of the notorious incidents of social life. In this case the road was cut through the plaintiff's land, and, if he had looked, was visible upon the ground. Whether it had been paid for was for him to inquire. The history of what had happened would have suggested that it was not improbable that sooner or later a payment must be made.

Decree reversed.

Mr. Justice HARLAN and Mr. Justice BROWN dissent.